Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term 1994

DANIEL SUGRUE

Petitioner

V

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, AND JOHN S. WOHL, ROBERTJ. SCHMIDT, JOHN DOES 1-X , and MARY DOES1-X, the true names of the said defendantsbeing unkown to the plaintiff at this time.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORAI

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QUESTIONS PRESENTED

Whether 211(a) as amended November 18, 1988 to become effective September 1, 1989 [and now renumbered as 511(a)], and which by its terms was to become effective September 1, 1989, and which was made retroactive to include only those veterans who filed notices of disagreement on or after the date of November 18,1988, is applicable to petitioner whose notice of disagreement was filed April 5, 1984?

Whether any of the four exceptions under 511b are applicable to plaintiff since the statute itself applies only to those veterans filing notices of disagreement on or after November 18, 1988?

Whether the privacy act continues to confer jurisdiction on the federal district courts because the privacy act is not governed by 511(a) [or any of the four exceptions thereto], or its predecessor 211(a) as amended November 18, 1988, or any of the four exceptions thereto?

Whether the freedom of information act applies confers jurisdiction on the US district courts with respect to veterans who filed notice of disagreement before November 18,1988, and to whom 211(a) as amended for veterans filing notices of disagreement
and with respect to whom 211(a) as amended [and 511a] does not apply?

Whether an ad hoc determination without governing rule or regulation published or otherwise is repealed by the freedom of information act as applied to veterans by the terms of 211(a) as amended and 511(a)?

Whether the exclusive delegation of medical examinations for disability evaluation [including degree of severity] to the Department of Medicine and Surgery denies like authority to any and all other persons in the Department of Veterans Affairs?

Whether the extinguishment of a vested, protected, federal entitlement, by reason of adjudications of service connected disabilities constituted a violation of the basic entitlement stature [and the protective legislation in supplement thereof] constituted a taking in violation of the Fifth Amendment to the Constitution of the United States?

Whether, assuming petitioner's factual allegations to be true, and the individual defendants intentionally and wilfully rendered effectively unavailable to petitioner the special procedural safeguard established by Congress for the benefit of former prisoners of war, enables petitioner as a former prisoners of war to bring a constitutional tort action for damages and other relief in the U.S. district courts against such individual defendants?

Whether, assuming petitioner's factual allegations to be true, and the individual defendants intentionally and wilfully rendered effectively unavailable to petitioner the special procedural safeguard established by Congress for the benefit of former prisoners of war, enables petitioner as a former prisoners of war to obtain injuctive relief to remedy same in the U.S. district courts.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The individual petitioner bought an action in the United States District Court for the Eastern District of New York to compel defendant, Department of Veterans Affairs (formerly the Veterans Administration and hereafter referred to as the VA), to grant him a medical neurological examination for disability evaluation in the Department of Medicine and Surgery as particularly provided for former prisoners of war.

The individual petitioner also brought an action against the individual defendants and alleged in the pleadings that the individual defendants, known and unknown, intentionally and wilfully rendered effectively unavailable to petitioner the safeguard medical examination particularly provided for former prisoners of war, and thus were liable in damages to be fixed by a jury for the alleged constitutional tort and to injunctive reliefy

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORAI

Daniel Sugrue petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

By order dated August 31, 1994, petition for rehearing contaoning suggestion that the action be reheard in banc

was denied. By order dared January 18, 1995, Justice Ginsburg signed an order extending the time for filing this petition to and including January 28, 1995.

JURISDICTION

The judgment of the court of appeals was entered May 17, 1994, and the order denying rehearing, with a suggestion for rehearing *in banc*, was entered on August 31, 1994. This Court has jurisdiction to issue the requested writ under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are listed above at page vii and are so long as to preclude reprinting them in the appendix with any purpose of simplifying the petition.

STATEMENT

The Court of Appeals for the Second Circuit concluded approvingly at page 5 of its opinion: "The district court dismissed the complaints, for lack of subject matter jurisdiction as to the complaint against the VA, see Sugrue, 808 F.Supp. ar 950, and for failure to state a claim as to the complaint against the VA Employees. See Id. at 951. * * *". The quoted sentence is restated at page 7 as follows: "As Judge Glasser correctly ruled, the language [of section 511] prevented the district court from exercising subject matter jurisdiction over Sugrue's claims against the VA. *See Sugrue*, 808 F.Supp.at 949-50."

What the district court decided is stated by it in these words: "For the following reasons, plaintiff's motion to amend complaint is denied, and the government's, motion to amend Sugrue 1 and Sugrue 11 for lack of subject matter jurisdiction is granted." See also pages 4 and 5 of the district court's opinion: "Plaintiff asserts four grounds for relief against the VA in Sugrue 1 and against the VA and the individual defendants in Sugrue 11, alleging that they violated (1) the Privacy Act ("PA"); (2) the Freedom of Information Act ("FOIA"); (3) the Due Process Clause of the Fifth Amendment; and (4) the Takings Clause of the Fifth Amendment. However, since the plaintiff seeks, in essence, judicial review of his disability rating and of his benefits award, all four claims for relief must be dismissed for lack of subject matter jurisdiction." As is clear from the above language of the District Court the appeal to the Court of Appeals for the Second Circuit was from the dismissals for lack of subject matter jurisdiction under 12(b)(1). The appellate court saw it otherwise and determined that as against the individual defendants the dismissal was under Fed.R.Civ.P.12(b)(6).

The statements of approval as to the district court's rulings on the claims against the agency are made despite the following text of 38 C.F.R. Sec. 1.581 (Judicial Review) which was duly promulgated pursuant to the authority of the privacy act, 5 U.S.C. Sec. 552a; and 38 U.S.C. Sec. 210(c). The Second Circuit concluded as did the District Court that the following text of the regulation did not confer subject matter jurisdiction upon the federal courts where the complainants were veterans receiving benefits and the determination as to the maintenance of the record might ultimately affect the compensation receivable by the individual veteran as a consequence of the amended record. The regulation, 38 C.F.R. Sec. 1.581 reads in relevant part as follows:

> "Any person may file a complaint against the Department of Veterans Affairs in the appropriate U.S. district court, as provided in 5 U.S.C. 552(a)(g), whenever the Department of Veterans Affairs:
> (a) * * *.
> (b) * * *.
> (c) Fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual: or
> (d) Fails to comply under any other provision of 5 U.S.C. 552a, or any VA regulation promulgated thereunder in such a way as to have an adverse effect on an individual."

The regulation is intended to assure fairness as required by the statute and is a due process requirement that must necessarily precede any final determination.

It seems well nigh impossible to construe the text of the above regulation so as not to confer subject matter jurisdiction upon the appropriate U.S. district court. There could not be a more clear statement of intent to confer subject matter jurisdiction on the courts than where it is alleged, as in the pleadings in this case, that the agency by denying a neurological examination for disability evaluation in the Department of Medicine and Surgery failed to maintain the record [medical; neurological] with the accuracy, relevance, timeliness, and completeness so as to insure fairness to the individual in its determination on the basis of such record, and consequently a determination is made that is adverse to the individual. The decisions below require nothing less than that they ignore the plain text of paragraph(c) of the above quoted regulation and effect a pro tanto repeal of the statute and regulation to the extent necessary to exclude veterans receiving benefits from the record projections provided by the privacy act. Besides the plain meaning of the text of the statute and regulation, is the fact that Congress left the privacy act provisions and the designated forum of the federal courts in place despite the extensive other forum changes wrought by the Veterans Judicial Review Act of 1988 which was signed by President Ronald Reagan on November 18, 1988 to become effective September 1, 1989.

An asserted federal claim should be dismissed for lack of subject matter jurisdiction only if the federal claim is clearly frivolous or wholly insubstantial. In *Bell v. Hood*, 327 U.S. 678 (1946), the Supreme Court, in reversing the dismissal of a claim asserting a violation of Fourth and Fifth Amendment rights * * * by federal agents, stated:

> "Jurisdiction, therefore, is not defeated, as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction. Whether the complaint states a case of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint did not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Vol. 2A, *Moore's Federal Practice*, Par. 12.07 [2-1], page 12-52, nn 26,27. The above quoted summary of the law as to when the pleadings are subject to dismissal for jurisdictional reasons in the federal courts is reviewed at length in *Spencer v. Casavilla*, 903 F.2nd 171,173(2nd Cir.1990), insofar as applied in the Court of Appeals for the Second Circuit,and is in accord.

Neither the district court, nor the court of appeals, found the pleadings in the present actions to be "clearly

frivolous" or "wholly insubstantial" or any of those things that would require dismissal on the merits of the allegations of the pleadings. The reasons given in the courts below had nothing to do with the above rules.

The district court explained that "since the plaintiff seeks, *in essence*, judicial review of his disability rating and of his benefits award, all four claims referring to the constitutional and statutory provisions] for relief must be dismissed for lack of subject matter jurisdiction." Whether the district court's *in essence* determination thereby decided issues of fact or decided issues of law, the decision that the pleadings "must" be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) is itself erroneous. Questions of law just as issues of fact must be decided after and not before the court has assumed jurisdiction, as so stated in *Bell v. Hood, above*, and quoted in *Spencer v. Casavilla, above*. See also Vol.2A, *Moore's Federal Practice*, Par. 12.07 [2-1] pp.12-50, 12-51, 12-52, nn. 22-25.

The district court was therefore required to decide if plaintiff had stated a claim upon which relief could be granted under the provisions of the Constitution, statutes and regulations invoked by the allegations of the pleadings. In determining the motion, the court must presume all factual allegations of the complaint to be true and all reasonable inferences are made in favor of the non-moving party. The court should deny a motion to dismiss for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 2A, *Moore's Federal Practice*, Sec. 1207n nn. 5,9.

> "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the

> claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. * * *."

Scheuer v. Rhodes, 416 US 232, 236 (1974). Also to be considered is that a dismissal under both rule 12(b)(1) and 12(b)(6) has a "fatal inconsistency" and cannot stand. *Ehm v. National R.R. Passenger Corp.*, 732 F.2nd 1250,1257 (5th Cir. 1984).

> "Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other."

Opelika Nursing Home, Inc. v. Richardson, 448 F.2nd 658, 657 (5th Cir. 1971) quoted in *Ehm*, above at 1257.

In deciding that 38 U.S.C. Sec. 511 deprived it of jurisdiction, the District Court concluded that petitioner's real motive was to avoid the effect of Sec. 511 [the renumbered successor to 211 as amended November 18, 1988], and that therefore petitioner must forfeit all statutory and constitutional rights otherwise available to him. This motivational analysis should be rejected. In *Winslow v. Walters*, 811 F.2nd 1114(7th Cir. 1987), this motivational approach was rejected in the following words:

> The court believed that Winslow's "real" motive was to recoup his benefits. However, instead of dismissing only those claims that challenged the determinations of the VA regarding Winslow's diagnosis and benefits, the district court seems to have concluded that these impermissible claims vitiated the complaint as a whole.
> The district court should have considered

> each of Winslow's separately. The fact that a court does not have jurisdiction over some of the claims in a complaint --even if the court believes they are the most significant claims--does not deprive the court of jurisdiction over claims that, standing on their own, would be sufficient to invoke the authority of the court.

Id. at 1117. The specific claim on appeal in *Winslow* was that the appellant "was denied a hearing and was denied his constitutional right to due process prior to having a property right taken from him." The court concluded:

> "A lawsuit making a procedural claim does not challenge "the interpretation or application of a particular provision . . . to a particular set of facts," *Robison*, 415 U.S. at 367, 94 S.Ct. at 1166. Rather, a suit challenging the constitutionality of the VA's procedures presents a question of law that arises under the Constitution. * * *."

Winslow v. Walters, 811 F.2nd at 1117.

The Department of Justice never argued the application of 511(a) in the district court. It was not until after the surprise decision of the district court rendered December 18, 1992 that the Department of Justice chose to invoke 511 rather than 211 as amended in 1970. They undoubtedly assumed that the statute as amended in 1988, 38 U.S.C. Sec 211 [now renumbered as 511] did not apply to petitioner. Section 211, as amended in 1988, was signed into law by President Ronald Reagan on November 18, 1988. It was provided that the amended statute was to

become effective September 1, 1989. It contained a limited retroactive temporal application, which made it applicable only to those veterans who filed their notices of disagreement on or after the date of November 18, 1988. Hence the assumption made in the district court by the U. S. Attorney's office in Brooklyn, New York, that the statute as amended in 1988 was not applicable to petitioner. The petitioner had filed his notice of disagreement in 1984.

The statute also contains nothing that would evidence a clear Congressional intent to effect a repeal of the Privacy Act or change the forum for the adjudication of privacy act issues from the federal district courts as presently provided although there is provision for new veterans forums provided with respect to the FOIA and COVA. Neither is the Privacy act addressed in any of the four exceptions provided in 511(b). Considered in the context of extensive statutory changes and changed forums, the absence of any change in the forum for resolution of privacy act issues, the enactment of 211 as amended in 1988, clearly evidences a congressional intent that the district courts retain subject matter jurisdiction of veterans privacy act claims.

The statute by clear statement in the text itself limits its temporal application to a period not earlier than November 18, 1988. This is properly to be read that it shall not apply to those such as petitioner who filed their notices of disagreement in 1984. In addition, if as decided in the courts below the statute is to operate retroactively beyond the stated date of November 18, 1988, there must be found a clear congressional intent requiring that result.

It is because of this absence of any clear statement of congressional intent that the retroactive application of the statute by the decision of the Court of Appeals for the Second Circuit [on May 17, 1994], in affirmance of the

district court, is contrary to the decisions of the Supreme Court in *Landgraf v. USI Film Products* 62 LW 4255 (4/26/94), and the companion decision in *Rivers v. Roadway Express Inc.*, 62 LW 4271 (1994), both of which were decided April 26, 1994, three weeks to the day before the decision of the court of Appeals herein on May 17, 1994. In *Landgraf* the Supreme Court restated the rules of statutory interpretation as they pertain to the retroactive operation of federal statutes. The express provisions in which limit the temporal application to the period on or after November 18, 1988, makes the citation of Landgraf unnecessary.

> "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules."

Congress has made it its intention plain in the instant case by specifying the date that it should become effective as to all parties except for its limited retroactive operation with respect to those veterans who filed their notices of disagreement on or after November 18, 1988. The petitioner contends that Congress has expressly prescribed the statute's proper reach and intended that its temporal application not go beyond November 18, 1988.

Alternatively, it is contended that the statute is not retroactive beyond the date of November 18, 1988 because of the absence of any clear statement that its temporal application extend beyond the date of November 18, 1988. Having decided that the federal courts must not be available to "disgruntled" veterans, the clear statement of congressional intent appearing in the text itself expressly

conferring subject matter jurisdiction on the appropriate U.S. district courts was unavailing. Furthermore, the presence of the clear statement of congressional intent as to the time application of 211 as amended in 1988 and renumbered as 511 did not prevent the district court from making these statutes retroactive to 1984.

The petitioner has pleaded that he is the beneficiary of an *adjudicated* service connected disability and as such was the owner of a vested, protected federal entitlement (e.g. 38 U.S.C.A. sec. 310 and the protective supplemental legislation, Sections 359 and 110), and that its extinguishment was a taking of a property right to which the rule in *Landgraf* is appropriate.

The two reasons given by the Court of Appeals for the Second Circuit for sustaining the retroactive application of 211 [renumbered as 511] is set forth in in the opinion at footnote 2

> 2. Section 511 was enacted by the Department of Veterans Affairs Codifications Act, Pub. L. No. 102-83, Sec.2(a), 105 Stat. 378, 388 (1991). It replaced, however, a substantially identical predecessor provision, see 38 U.S.C. Sec. 211(a) (1988), that was construed in *Johnson*. *See Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1500)(noting that 1970 version of Section 211(a) substantially similar to current Section 511(a)).

The *Johnson* case to which reference is here made refers to *Johnson v. Robison*, 415 U.S. 361 (1974), some fourteen years before section 211(a), as amended in 1988, was enacted. The phrase "substantially identical" is correct

since 511 is merely 211 [as amended in 1988] renumbered. It is identical. However, the added phrase that the 1970 version of Section 211(a)is "substantially similar" to current 511(a) is wrong, which indicates that the words "identical" and "similar" were used advisedly. *See Larrabee by Jones,* a post 1988 amenment case, where it is acknowledged that the two statutes, 1970 and 1988, purposefully differ.

> Concerned that "the Court's opinion in *Traynor* would inevitably lead to increased involvement of the judiciary in technical VA decision-making", H.R.Rep. No.963, 100th Cong., 1st Sess. 27 (1988), reprinted in 1988 U.S.C.C.A.N. 5782,5803, Congress overhauled section 211 in Veterans' Judicial Review Act ("VJRA"), Pub.L.No. 100-687, 102 Stat. 4105 (1988). * * *. VJRA provides, for the first time, judicial review of veterans' benefits in the Federal Circuit; at the same time it broadens section 211's preclusion of judicial review by other courts. * * *."

The phrase "judicial review of veterans' benefits" in the above quote, it is of importance to note, does not include the Privacy Act review of the record provided in the appropriate district courts pursuant to 38 C.F.R. 1.581 (Judicial Review); and promulgated pursuant to the 5 U.S.C. 552a and 38 C.F.R. 210(c). The *Larrabee* opinion further states:

> " By providing judicial review in the Federal Circuit, Congress intended to obviate the Supreme Court's reluctance to construe the statute as barring judicial

> review of substantial statutory and constitutional claims, see *Traynor*, 485 U.S. at 542-43, 108 S.Ct at 1378-1379; *Johnson*, 415 U.S. at 366-67, 94 S.Ct at 1165-66, while maintaining uniformity by establishing an exclusive mechanism for appellate review of decisions of the Secretary. * * *."

It is submitted that the Supreme Court was moved to its decisions in *Traynor* and *Johnson* rather by the language if 211(a) as it existed prior to the 1988 amendment than by its reluctance to bar judicial review of substantial statutory and constitutional rights. *See* dissent in *Traynor v. Walters*, 791 F.2d 226 (2d Cir.1986) which prevailed in the Supreme Court. *Traynor v. Turnage*, 485 U.S. 535 (1988).

Another decision of the Supreme Court, *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 1985, construed Section 211(a) as it then existed to permit a challenge to procedural provisions of the VA statute that allegedly denied due process, the stating (473 U.S. 305, 311, n.3):

> "Despite the general preclusion of judicial review with respect to VA benefits claims, this Court held in *Johnson v. Robison*, 415 U.S. 361, 94 S. Ct. 1160, 39 L.Ed.2d 389 (1974), that the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims system."

A lawsuit making a procedural

claim dies not challenge "the interpretation or application of a particular provision . . . to a particular set of facts." *Johnson v. Robison*, 415 U.S. at 361, 367 (1974). See also *Marozsan v. United States*, 852 F.2d 1469 (7th Cir. 1988)

where a majority of the en banc court, eight of eleven judges, concluded:

> "*Johnson* and *Traynor* thus support the conclusion that the federal courts are empowered and obligated to review substantial claims of unconstitutional agency action, such as the imposition of an arbitrary quota system."

Marozsan, at page 1477. Such was the law when the petitioner's demand for a neurological examination for disability evaluation in the Department of Medicine and Surgery, and hence the hearing due him as a former prisoner of war wad rejected.

Where individual defendants refuse to grant former prisoners of war the special safeguards and medical evaluation established by congress for their protection, petitioner argues that as a former prisoner of war may bring a constitutional tort action for damages and other relief against such individual defendants.

The courts below disagree and held that the denial of benefits arising out of due process violations does not give rise to an action of damages against federal employees responsible for violations. The focus of course is on 511(a), and it's predecessor 211(a) as amended November 18, 1988 [which is not applicable to petitioner because of his having filed the notice of disagreement in 1984] in claiming that it is violative of the congressional policy as expressed in these sections. Also, of course, is the concern that the floodgates if once thrown open to veterans would drown the judicial system. These concerns, it is submitted does not apply.

On or about 1981, former prisoners of were advised by the VA of recent legislation which enabled them to obtain medical care at VA facilities. On February 14, 1983 petitioner availed himself of this service. He was examined by Dr. Bennett M. Derby, a board certified neurologist, at the VA outpatient Center at Seventh Avenue and 24th Street in Manhattan. Dr. Derby advised petitioner that he suffered from a "marked neurological impairment" and explained that he was referring to plaintiff's tremors of the head and hands. The neurologist performed certain tests during said examination and noted and noted in the medical record that the degree of disability approached totality for an attorney at law. The petitioner, being aware that he suffered from this condition since his release from the prisoner of war camp in 1953, decided to file claim for service connected disability for neurological disorder.

On February 15, 1983, petitioner filed claim for "a neurological disorder which was recently diagnosed (2/14/83) at NYRO OPT Center which I believe had its origin in my incarceration as a POW while in Korea from April 1951 to September 1983." The claim as thus filed on February 15, 1983, was rejected by form letter dated April 6, 1983 without benefit of any examination for disability evaluation in the Department of Medicine and Surgery or any communication with petitioner. The letter of April 6, 1983, was signed by defendant S. Wohl.

On April 5, 1984, plaintiff filed Notice of Disagreement but was never at any time afforded a neurological examination for disability in the Department of Medicine and Surgery to which was delegated the power and function to conduct medical examinations for disability evaluations.

The consequence of the refusal of a referral for examination in the Department of Medicine and Surgery in the form mandated for prisoners of war as hereafter detailed in this brief was effectively to deprive petitioner of the opportunity to have his claim evaluated by the only competent and duly authorized medical department charged with and to whom was delegated that responsibility. All of the above has been alleged in the pleadings which were dismissed in the courts.

Petitioner, is a former prisoner of war, and without further showing, was entitled to a "complete physical examination" for disability evaluation in the VA's own Department of Medicine and Surgery on his neurological claim. 38 C.F.R. 326(c).

At all times relevant to the present actions, the Department of Medicine and Surgery was delegated the

responsibility of performing disability evaluation examinations for adjudications by the Department of Veterans Benefits. The VA Manual, *Physicians Guide for Disability Evaluations Examinations* (1B 11-56 Dept. Medicine and Surgery, March 1, 1985), paragraph 1-1, page 1-1, b.

> b. In the Veterans Administration, the Department of Medicine and Surgery is responsible for furnishing complete medical and hospital service for claimants as defined by public laws. This responsibility includes performing disability evaluation examinations for adjudications by the Department of Veterans Benefits.
> Disability evaluation examinations are required by the Department of Veterans Benefits to establish the presence of injuries, diseases, or residual conditions and the severity of disabling conditions for compensation and pension purposes.

Chapter 17, *Medical Evaluations of Former POW's*, of the said VA Manual, provides that when examining former POW's, physicians should do so with particular thoroughness to discover "all disabilities, in addition to those claimed" and further provides that pertinent special examinations will be accompanied "in each claim" with special reference to circumstances under which the veteran was held as a POW.

A "complete physical examination" (38 C.F.R. 3.326(c), must include a neurological, which was the only claim actually made. This is spelled out in the VA Manual cited above.

1.7 Scope of the Examination

> "d. when examining former POW's, physicians should do so with particular thoroughness to discover *all disabilities, in addition to those claimed*, which are present, particularly those characteristically associated with confinement and deprivation as a POW. Pertinent special examinations will be accompanied *in each claim* with special reference to manifestations of metabolic origin, psychiatric character, or other syndrome consequent to malnutrition, avitaminosis, exposure, or other circumstances under which the veteran was held as a POW." *Emphasis added.*

The quoted provision makes it very clear that when examining former prisoners of war the physician must be through in the examination of all claimed disabilities, and even to discover those disabilities that were not claimed. It is thus taken as a given that at least as to all claimed disorders the same will receive a through examination in the Department of Medicine and Surgery. A through examination of a claimed neurological disorder as conducted by the Department of Medicine and Surgery as spelled out in the *VA Manual, Physician's Guide for Disability, Evaluation Examinations, Chapter 13, Neurological Examinations*. The cited manual describes what a neurologic examination for disability evaluation consists of and explains the procedures and requirements that must be followed.

The Second Circuit concluded, on the authority of *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), that a *Bivens* Claim cannot lie against VA employees because " special factors counselled

hesitation" to create a new remedy where congress provided for adequate remedies for constitutional violations 462 U.S. at 388-389. Likewise, in *Schweiker* the court refused to recognize a *Bivens* claim against Federal employees who initially denied social security benefits to the plaintiffs 487 U.S. at 417-18. The Court held that he broad remedial structure of that statute was a "special factor" counselling against creating a new remedy. In the view of the courts below, congress made available a comprehensive remedial structure to address disputes regarding disability ratings and benefits claims by veterans.

None of the foregoing applies to 38 U.S.C. 211(a) as it existed prior to November 18, 1988 and therefore applicable to petitioner. No such remedial structure was available. In *Johnson v. Robison,* 415 U.S. 361 (1974), the Court gave as one of the reasons for its decision was the fact that it was supported by the VA administrative practice that disclaimed authority to decide constitutional issues. Such was the law at all times relevant to petitioner's case. And see *Walters v. NARS*, 473 U.S. 305(1985) the Court again stated on the authority of *Robison* that the federal courts had jurisdiction to entertain constitutional attacks "on the operation of the claims system." 473 U.S. 305,311, n.3. The courts where the only forums available.It is therefore not possible to accept the proposition that the VA possessed adequate remedial mechanism for constitutional violations that might occur in the course of administration, and the *Schweiker v. Chilicky* decision above is not applicable.

The same applies to the decision in *Bush v. Lucas*, 462 U.S. 367 (1983), also cited by Ms McAvoy at page 26, as there did not exist the "elaborate remedial system" addressed in that case and for the same reasons i.e. the agency having rightly disclaimed authority to remedy

constitutional violations (in the view of the United States Supreme Court) no such remedial system remained in place.

However, Bush v. Lucas, and it's progeny, including Schweiker v. Chilicky, above, are premised on the availability of an adequate system of procedural safeguards through which a plaintiff may seek relief. In the instant case, plaintiff's due process claim is premised on the defendants interference with the procedural mechanisms created for the protection of former prisoners of war. It is in this critical respect that Bush v. Lucas and related cases are distinguishable. In each such case, the availability of an adequate procedural remedy was decisive. In this case, plaintiff consistently attempted to avail himself of the administrative remedies available to former prisoners of war but as alleged in the complaint plaintiff has been consistently thwarted in all of these attempts by the actions of the defendants. If it be assumed that plaintiff's factual allegations are true, and this court must so assume for purposes of these motions to dismiss the complaint, *Scheuer v. Rhodes*, 416 U.S. 232.236 (1974), defendants have rendered effectively unavailable the procedural safeguards established for the protection of former prisoners of war. Thus Bush v. Lucas and it's progeny is inapplicable to the facts of the present case. *Rauccio v. Frank, 750 F. Supp. 566 (D.Conn).*

In Rauccio v. Frank, above, a postal service employee brought an action seeking damages and injunctive relief against superiors and the United States. He alleged that he had been foreclosed from pursuing remedies provided by the Civil Service Reform Act (CSRA) in connection with a demotion and a subsequent termination of his employment. The United States District Court for the District of Connecticut held that the CSRA did not preclude plaintiff from bringing action under Bivens for alleged due

process violations substantially for the reasons stated in the preceding paragraph. , i.e. existence of adequate procedural remedies are in actuality rendered effectively unavailable to the plaintiff. The court stated with respect to Bush V. Lucas and related cases that it was the "availability" of adequate remedies and not just the "existence" of such remedies that was decisive of the issue.

> "In each, the availability of an adequate procedural remedy was fatal to the plaintiff's *Bivens* claims. In this case, assuming plaintiff's factual allegations to be true, defendants have rendered effectively unavailable any procedural safeguard established by Congress. Thus, *Bush* and its progeny are inapplicable to the facts of this case.
>
> The existence of an adequate system of procedural safeguards, which was a "special factor" counseling against the creation of a Bivens remedy in *Bush* and *Schweiker*, is clearly absent under the circumstances of the *Bivens* case. Accordingly, plaintiff in this action should be permitted to maintain a cause of action under the *Bivens* doctrine for violation of his right to due process pursuant to the Fifth Amendment to the United States Constitution."

750 F.Supp. at 571. Government employees are not free to arbitrarily interfere with a plaintiff's vindication of his claim:

> Unconstitutional deprivation of a cause job action occurs when government officials thwart vindication job a claim by violating basic principles that enable civil claimants to assert their rights effectively."

Barrett v. United States, 798 F. 2nd 565, 575 (2nd Cir. 1986).

In the instant case, petitioner's claim is premised on defendants interference with the procedural safeguard of a special medical examination for the protection of former prisoners of war.

Petitioner submits that where individual defendants intentionally refused to grant former prisoners of war the special procedural safeguards and medical evaluation established by congress for their special protection, petitioner as a former prisoner may bring a constitutional tort action for damages and other relief against such individual defendants.

The defendant, Robert J. Schmidt, advised petitioner on October 14,1984, in explanation of the denial of his claim for neurological disorder without referral to the Department of Medicine and Surgery for a neurological examination for disability evaluation, as follows:

> "Service connection for a nervous condition was established from November 23, 1953 with Parkinsons features. Tremors have always been considered as part of this disability resulting from POW experience. * * * ".

The reference here is to the date of petitioner's discharge from the United States Army. Petitioner was serving as an infantry rifleman with the Twenty Fifth Infantry Division when captured by the Chinese military forces in Korea in April of 1951. Petitioner was held captive as a prisoner of war by the Chinese military until released in August of 1953 following the signing of the truce agreement which ended the active phase of the fighting on the Korean peninsula in July of 1953. Petitioner was thereafter repatriated and received an honorable discharge from the Army on November 23, 1953. Hence the date of the service connection referred to above.

Petitioner at the time of his release from the prison camp had a marked tremor which was duly noted in his medical records with other symptoms. On January 19, 1954, petitioner underwent a medical examination disability evaluation. The diagnosis was made by the Medical Division, later called the Department of Medicine and Surgery, read as follows:

"Diagnoses: (1) Parkinsonism
(2) Anxiety Reaction"

The diagnosis of "Parkinsonism" is handwritten under the title "Neurological Examination" while "Anxiety Reaction" is handwritten under the title of "Mental Status" on the diagnosis sheet. Said diagnoses were stamper "Cleared" by the Medical Division ON March 11, 1954. The "Report of Medical Examination for Disability Evaluation" was stamped "APPROVED-MEDICAL DIVISION", and was acknowledged by the Adjudication Division on March 12, 1954, as indicated by the stamp thereon, and on March 17, 1954, the Adjudication Division rendered its decision which read "Anxiety Reaction with Parkinson features, Chronic Mod. Severe". The diagnostic code number used for rating purposes applied only to anxiety reaction with no qualifying phrases added thereto.

The notice refers to no rule or regulation or other authority published in the Federal Register or elsewhere containing the eligibility requirements which denied to petitioner any benefits to which he might be entitled by reason of his adjudicated service connected disability ("Parkinsonism").

The Board of Veterans Appeals, again without referral for neurological examination for disability evaluation, and again without citation to any rule or regulation or other authority, whether published or unpublished, gave as its medical opinion that petitioner's adjudicated disabilities "were best viewed as one disability" referring to the"Anxiety Reaction" adjudication of November 23, 1953.

It was to avoid the inherent arbitrary nature of unpublished *ad hoc* determinations such as this that the Administrative Procedure Act was enacted. *Morton v. Ruiz*, 415 U.S. 199, 231-232 (1974) In *Morton v. Ruiz*, 415 U.S. 199 (1974), this Court held that a legal entitlement may not be extinguished by an *ad hoc* determination.

> "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill the gap left, implicitly or explicitly, by Congress. * * * . This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, [citations omitted], but also employ procedures that conform to the law. [citations omitted]. No matter how rational or consistent with the congressional intent a particular
> decision may be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of funds."
> "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated so as to avoid the inherent arbitrary nature of unpublished *ad hoc* determinations. * * * ".

Quoted from the opinion of Blackmun, J., writing for a unanimous court in *Morton v. Ruiz, supra.*

The courts below avoided the effect of Administrative Procedure Act, 38 U.S.C. Sec. 552, by invoking the exceptions under 511(b) which is not applicable to petitioner it being merely a renumbered version of 211(b) as amended November 18, 1988 and expressly made applicable only to notices of disagreement filed on or after that date. Besides the due process component as set forth in *Morton v. Ruiz* would not be effected thereby since presumably the statute provided an additional remedy not a pro tanto repeal of the Due Process Clause.

Compliance with the interpretations of the statute and cases arrived at in the courts below would require a veteran to proceed in three different forums. They deprived veterans filing their notices of disagreement before November 18,1988 of the benefit of the Privacy Act, on the assumption that 511(a) [211(a)] modified the Privacy Act, and 511(b) shifted the forum to the Federal Circuit since both courts below did not deem it necessary to address the substance of the FOIA claim.

The authority thus delegated to the Department of Medicine and Surgery may not be avoided or exercised by anyone else within the Department of Veterans Affairs. They may not contradict the separate diagnosis of "neurological condition" on the diagnosis sheet and at the same time accord exclusive authority to the Department of Medicine and Surgery as required by their own regulations. This includes the Secretary of Veterans Affairs (formerly the Administrator) or any surrogate. In *United States v. Nixon*, 418 U.S. 683 (1973) the Attorney General delegated authority to the Special Prosecutor. The Supreme Court, in discussing the procedural significance of such delegation of authority, stated:

> So long as this regulation is extant it has the force of law. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise it own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and could assert it by amending the regulations. *Service v. Dulles*, 354 U.S. 363, 388 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959),

reaffirmed the basic holding of *Accardi*."

> "Here, as in Accardi, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as sovereign composed of the three branches is bound to respect and to enforce it. * * *."

United States v. Nixon, 418 U.S., pages 695-696 (1973). These are very fundamental constitutional considerations to invoke for the enforcement of the regulation defining the delegate's administrative authority. The same rule applies to the regulation defining the authority of the Department of Medicine and Surgery quoted above. The statement of the constitutional rule in *Nixon* leaves no room for excepting therefrom the Department of Veterans Affairs (formerly the Veterans Administration). It is a part of the 'Executive Branch' and is "bound by it" so long as the regulation remains in force.
In *Accardi*, cited in *Nixon*, *above*, the Supreme Court held that once the Attorney General had promulgated a procedure for a hearing, his compliance therewith was mandatory, if the party benefited was to be afforded "that *due process* required by the regulations in such proceedings." *United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954). Morton v. Ruiz*, reaffirms the rule: Before the BIA may extinguish the entitlement of those otherwise eligible beneficiaries, it must comply, at a minimum with its own internal procedures." 415 U.S. at 235 (1973).

Plaintiff's statutory entitlement provides that "the United States will pay to any veteran" who is "disabled" in line of duty in the active military, naval, or air service, during a period of war, "compensation as provided in this subchapter" (the

subchapter reference being to "Subchapter 11-Wartime Disability Compensation" which includes sections 310 to 322). 38 U.S.C. Section 310.

The two elements necessary to become thus entitled to the compensation promised is that the veteran be disabled and that the disability be service connected. The term "service-connection" is defined in 38 U.S.C. Section 101 (16) as "in line of duty in the active military, naval or air service." It omits the phrase "during a period of war" which is added in Section 310 above, to distinguish it from the separate provision made for peacetime disability compensation in Subchapter IV (Sections 331 to 337). These necessary conditions are fully satisfied in plaintiff's case and no genuine issues of material fact arise with respect thereto in the present action.

These conditions of entitlement are acknowledged by the VA and so *adjudicated* since the decision of March 17, 1954. See letter of Robert J. Schmidt dated October 18, 1984 quoted above.

In 1960, and again in 1964, congress passed legislation to protect and secure the interests of veterans and their entitlement. *See* 38 U.S.C. Section 359, *(Protection of Service Protection)*, and 38 U.S.C. Section 110, *(Preservation of Disability Ratings)*. The evident purpose of these statutes in supplement of the basic entitlement was to secure to veterans, and this retroactively, the beneficial enjoyment of these entitlement.

The extinguishment of petitioners entitlement, not withstanding the adjudications of disability, and service connection, was contrary to the above statutes, and constituted a taking of a vested protected, federal entitlement and it's extinguishment was in violation of the above statutes and a taking in violation of the Fifth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE PETITION

The issues raised by the petition involve the subject matter jurisdiction of the courts below and the denial of any forum to petitioner and others similarly situated in which they they may be heard with respect to the substantive rights thus nominally conferredss upon them as former prisoners of war.

The resolution achieved in the courts below required the retoactive applications of statutes to achieve this is end. which seem obviously unwarranted.

The questions preented above at page i and the statement above at page 3 all require the attention of the the attention of the Courtto clarify the consequences of the Veterans Judicial Review Act and its effect on the other relevant legislation

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgement of the court of appeals should be reversed.

Dated: January 27, 1995

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 483, 686 -- August Term, 1993
(Argued: October 20, 1993 Decided: May 17 1994)

Docket Nos. 93-6137, 93-6139

DANIEL SUGRUE,
Plaintiff Appellees,
-v.-
EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, AND S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X and MARY DOES 1-X, the true names of the said Doe defendants being unknown to the plaintiff at this time,

Defendant Appellees.

Before: MAHONEY and WALKER, *Circuit Judges*, and METZNER*, *District Judge*.

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* The Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, sitting by designation.

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Plaintiff appellant Daniel Sugrue appeals from a judgment entered January 4, 1993 in the United States District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, that dismissed Sugrue's actions against the Department of Veterans Affairs and several named and unnamed employees of the Department of Veterans Affairs. Sugrue claims that the defendants violated his constitutional and statutory rights in determining his disability benefit award.

We affirm.

KEVIN P. QUILL, Long Island City, New York, for *Plaintiff-Appellant*.

JENNIFER C. BOAL, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Zachary W. Carter), United States Attorney for the Eastern District of New York Robert L. Begleiter, Deborah B. Zwany, Assistant United States Attorneys for the Eastern District of New York, Brooklyn, New York, of counsel), for *Defendants-Appellants*.

MAHONEY, *Circuit Judge:*

Plaintiff- Appellant Daniel Sugrue appeals from a judgment entered January 4, 1993 in the United States District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, that dismissed Sugrue's actions against the Department of Veterans Affairs[1] for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and against several named and unnamed employees of the VA (the "VA Employees") for failure to state a claim upon which relief can be granted pursuant to Fed. R. Calve. P. 12(b)(6). *See Sugrue v. Derwinski*, 808 F. Supp. 946 (E.D.N.Y. 1992) (opinion supporting judgment), as amended by *Sugrue v. Derwinski*, No. CV-90-1972, slip op. at 7 (E.D.N.Y. Mar. 26, 1993). Sugrue's complaints against the VA and the VA Employees alleged that the defendants had violated his rights under the Fifth Amendment to the Constitution, the Privacy Act, 5 U.S.C. 552a, and the Freedom of Information Act (the "FOIA"), 5 U.S.C. 552, in determining his disability benefit award.

We affirm.

Background

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[1] The Veterans' Administration, the predecessor to the Department of VEterans Affairs, eas redesignated as the Department of Veterans Affairs by the Department of Veterans Affairs Act, Pub. L. No. 100-527, Sec. 2, 102 Stat. 2635, 2635 (1988). Bothe the Deparmtnet and the Administration are hereinafter referred to as the "VA".

Background

This dispute stems from long term injuries sustained by Daniel Sugrue when he was a prisoner of war. During the Korean War, then a soldier in the United States Army (the "Army"), was a prisoner of war from April 1951, when he was taken captive, to August 1953, when he was released at the conclusion of that conflict. Sugrue was honorably discharged from the Army in 1953. At that time, an Army medical examination revealed that Sugrue suffered from "Parkinsonism" and "Anxiety Reaction." In that connection, the VA adjudication division rated him as thirty percent disabled.

In 1981, the VA advised former prisoners of war of legislation enabling them to obtain medical care at VA facilities. *Id.* On February 14, 1983, Sugrue availed himself of this service and underwent a medical examination at a VA facility by a neurologist retained by the VA. According to Sugrue, the neurologist determined that Sugrue, a lawyer, suffered from a neurological disorder resulting in near "total disability for work as an attorney." Sugrue filed a claim with the VA based upon this diagnosis. By letter dated April 6, 1983, S.Wohl, one of the VA Employees, rejected Sugrue's claim on the ground that "the evidence d[id] not warrant any change" in the prior disability determination.

On April 5, 1984, Sugrue initiated an administrative appeal of this finding by filing with the VA a notice of disagreement challenging the VA's failure to raise his sability rating. *See* 38 U.S.C. 4005 (1988) (recodified as 38 U.S.C. 7105 (Supp. III 1991)). By letter dated April 11, 1984, Robert J. Schmidt (another ofthe VA Employees) a regional VA adjudication officer, invited Sugrue to

38 U.S.C. 7105 (Supp. III 1991)). By letter dated April 11, 1984, Robert J. Schmidt (another ofthe VA Employees) a regional VA adjudication officer, invited Sugrue to undergo a neuropsychiatric examination. Following examinations by a psychiatrist and a neurologist, the VA increased Sugrue's disability rating to fifty percent. Sugrue continued to disagree with his disability rating, and pursued his case before the Board of Veterans Appeals (the "BVA"). After a hearing at which Sugrue's claim was presented by counsel, however, the BVA affirmed his fifty percent disability rating.

Sugrue then filed the instant actions, contending that the VA and the VA Employees violated (1) the Privacy Act, 5 U.S.C. 552a,as a result of the VA's failure to maintain its record regarding S, relevance, timeliness, and completeness, necessary to assure fairness to [Sugrue] in reaching its determination;" (2) the FOIA, 5 U.S.C. 552, in that "[Sugrue's] claim and defendants [sic] adverse determination thereof was {sic} affected by matter required to be published in the Federal Register and not so published;" (3) the Fifth Amendment guarantee of due process; and (4) the Fifth Amendment prohibition against the taking of private property for public use without just compensation.

The district court dismissed the complaints, for lack of subject matter jurisdiction as to the complaint against the VA, see *Sugrue* 808 F.Supp. at 950, and for failure to state a claim as to the complaint against the VA Employees. *See id.* at 941. The district court also denied Sugrue's motion to amend his complaint against the VA to add the VA Employees as individual defendants. *See id.*

This appeal followed.

that:(A) The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . . Subject to subsection (b), the decision of the Secretary as to any such question shall be final and any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(B) The second sentence of subsection (a) does not apply to --

(1) matters subject to section 502 of this title;
(2) matters covered by sections 1975 and 1984 of this title;
(3) matters arising under chapter 37 of this title: and
(4) matters covered by chapter 72 of this title.

Section 502 relates to judicial review of rules and regulation to which reference is made by 5 U.S.C. 552(a)(1) or 553 (regarding rules and regulations that federal agencies are required to promulgate by FOIA), but 502 review is available only in the Court of Appeals for the Federal Circuit. Sections 1975 and 1984 relate to civil actions regarding life insurance. Chapter 37 relates to housing and small business loans.

Chapter 72 relates to the United States Court of Veterans Appeals, an Article 1 court established in 1988 that has "exclusive jurisdiction to review decisions of the [BVA]."38 U.S.C. 4052(a) (1988) (recodified as 38 U.S.C. 7252(a) (supp. III 1991)). However, that jurisdiction is available only as to "any case in which a notice of disagreement is filed under section 4005 [now 7105] of title 38... on or after the enactment of [Public Law No. 100-

687; i.e., November 18, 1988}." Veterans Judicial Review Act - Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, 402, 102 Stat. 4105, 4122; *see also Prenzler v. Derwinski* 928 F. 2d 392, 393-94 (Fed. Cir. 1991). As indicated earlier, Sugrue filed his notice of disagreement of April 5 , 1984.

Accordingly, none of the exceptions stated in 511(b) apply in this case, and the governing rule is provided by 511(a)'s bar of review of the VA's determination of Sugrue's benefit level "by any court, whether by an action in the nature of mandamus or otherwise." As Judge Glasser correctly ruled, this language prevented the district court from exercising subject matter jurisdiction over Sugrue's claims against the VA. *See Sugrue*, 808 F. Supp at 949-50.

Section 511(a) is deigned to (1) ensure that benefits claims will not burden the courts and the va with litigation, and (2)promote the adequacy and uniformity of complex veterans' benefits decisions. *Johnson v. Robison*, 415 U.S. 361, 369-70 (1974). In *Johnson*, the Court distinguished between suits challenging the constitutionality of the statutes underlying veterans programs, to which 511(a) does not apply (over which court thus have jurisdiction), and actions of the VA under those statutes in determining qualifications for benefits, to which 511(a) does apply (over which courts therefore lack jurisdiction) *See Johnson*, 415 U.S. at 367-74; *Larrabee*, 968 F.2d at 1500.

Sugrue's claims against the VA challenge the VA's denial of a certain level of benefits to Sugrue based upon a disputed disability rating. His complaints seek "to place plaintiff in the position he would have occupied but for the . . . unlawful acts and conduct [of the VA and the VA employees] and mak[e] him whole for all entitlements he would have received but for said unlawful acts and conduct."

Although Sugrue's complaints invoke provisions of the Fifth Amendment and are styled in part as constitutional actions, the courts do not acquire jurisdiction to hear challenges are cloaked in constitutional terms. *See Pappanikoloaou v. Administrator of Veterans Admin.*, 762 F. 2d 8, 9 (2d Cir.) (per curiam) ("one may not circumvent [5]11(a) by seeking damages on a constitutional claim arising out of a denial of benefits") (collecting cases), *cert. denied*, 474 U.S. 851 (1985); *see also Larrabee*, 968 F. 2d. at 1500 511(a) "precludes judicial review of non-facial constitutional claims") (collecting cases). Similarly, neither the Privacy Act nor the FOIA may be used as a rhetorical cover to attack VA benefits determinations.

We turn to Sugrue's claims against the VA Employees. In accordance with*Bush v Lucas*, 462 U.S. 367 (1983), and *Schweiker Chilicky*, 487 U.S. 412 (1988), we decline, as did the district court, to find that a cause of action lies against the VA Employees in their individual capacities.

In *Bush*, an employee of the National Aeronautics and Space Administration sued the Director of the George C. Marshall Space Flight Center (the "Center") after the Director demoted the employee, allegedly in retaliation for publicly critical remarks made by the employee about the Center. The employee sought damages for a claimed violation of his rights under the First Amendment. The Supreme Court noted that although*Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 402 U.S. 388 (1971), and its progeny had established that the Constitution supports private causes of action against federal officials for constitutional torts, *see Bush*, 462 U.S. at 374, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service Id at 389.

Accordingly, the Court declined to find a new private right of action for a federal employee when comprehensive federal legislation had already established "an elaborate remedial system that ha[d] been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 388.

In *Schweiker*, the Court rejected claims premised upon the denial of Fifth Amendment rights that were advanced by social security disability benefit recipients against federal and state officials administered the disability benefit program. After detailing the multilayered remedial scheme available to benefits claimants under the social security disability program the Court held that the case could not be reasonably distinguished from *Bush*, stating:

> Here, exactly as in *Bush*, Congress has failed to provide for "complete relief": respondents have not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits. The creation of the *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed. Congress, however, has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were. Indeed, the system for protecting their rights is, if anything, considerably more elaborate than the civil service system considered in *Bush*.

487 U.S. at 425 (citations omitted); *Cf. FDIC v. Meyer*, 114 S. Ct. 996, 1006 (1994) (declining to authorize *Bivens* actions against federal agencies).

In our view, the same reasoning applies in the context of veterans' benefits. Sugrue's action against the VA Employees is based solely upon their acts or omissions concerning the assigning of a disability rating, and hence a benefit level, to Sugrue. Congress has enacted a comprehensive remedial structure to address disputes regarding disability ratings and benefits claims by veterans.

A veteran claiming disability benefits from the VA enjoys "a beneficial non-adversarial system" of adjudicating veterans benefits claims in which the VA is "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 963, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S.C .C.A.N. 5782, 5795. For example, at the time when Sugrue's VA Claim was under administrative consideration, the VA was required to assist claimants in obtaining evidence in support of their claims, 38 U.S.C. 3007(a) (1988) (recodified as 38 U.S.C. 5107(a) (Supp. III 1991)). Moreover, claimants were entitled to: (1) receive the benefit of doubt in proving benefit claims, 38 U.S.C. 3007(b) (1988) (recodified as 38 U.S.C. 5107(b) (Supp. III 1991)); and (2) reopen disallowed claims by submitting new and material evidence. 38 U.S.C. 3008 (recodified as 38 U.S.C. 5108 (Supp. III 1991)).

As in *Bush* and *Schweiker*, the scheme of review for veterans' benefit claims provides meaningful remedies in a multitiered and carefully crafted administrative process. Further, the fact that Congress has explicitly foreclosed a remedy in Article III courts against the VA, *see* 522(a), and the policies underlying that prohibition,*see Johnson*, 415 U.S. at 369-70, suggest that Congress' failure to create a remedy against individual employees of the VA was not an oversight.

Finally, Congress has accorded frequent attention to the issue of judicial review of VA benefits determinations, and only in 1988 did it provide for a limited form of review when it established the United States Court of Veterans Appeals, an Article I court authorized to review BVA decisions. *See* Veterans' Judicial Review Act - Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, sections 301-303, 102 Stat. 4105, 4113-22 (codified in scattered sections of 38 U.S.C.); H.R. Rep. No. 963 at 10-13,*reprinted in* 1988 U.S.C.C.A.N. at 5792-94 (recounting numerous previously unsuccessful attempts to enact judicial review of veterans benefits determinations). This history provides additional evidence that Congress has declined to enact the remedy that Sugrue asks us to create against the VA Employees. Following *Bush* and *Schweiker*, we will not create such a remedy when Congress has chosen not to do so.

Conclusion

The judgment of the district court is affirmed.

DANIEL SUGRUE, Plaintiff
v.
Edward J. DERWINSKI,Secretary of Veterans Affairs, Defendant

DANIEL SUGRUE, Plaintiff,

v.

Edward J. DERWINSKI, Secretary of Veterans Affairs, and S. Wohl, Robert J. Schmidt, John Does 1-X and Mary Doe 1-X, the true names of said Doe defendants being unknown to the plaintiff at this time, Defendants

Nos. CV-90-1972; CV-91-2041

United States District Court,
E.D. New York

Dec. 18, 1992.

MEMORANDUM AND ORDER

Glasser, District Judge:

In two pending actions, plaintiff Daniel Sugrue alleges that the Department fo Veterans Affairs("VA") and its employees violated his constitutional and statutory rights in determining his veterans' benefits award. Plaintiff moves to serve a second amended complaint in the first action, CV-90-1972 ("Sugrue"), which is identical to a complaint already filed in the second action, CV-91-1041 ("Sugrue II"). The government moves to dismiss both Sugrue I and Sugrue II for lack jurisdiction and for

failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment. For the following reasons, the government's motion to dismiss is granted in both actions and the plaintiff's motion to amend his complaint in Sugrue I is denied.

FACTS

On June 11, 990, plaintiff Daniel Sugrue, an attorney admitted to the New York bar in 1961, commenced an action against defendant Thomas [sic] Derwinski, Secretary of the VA, alleging that the VA in setting his disability at 50 percent and refusing to revise that disability rating, violated the Privacy Act ("PA"), 5 U.S.C. Sec. 552a; the Freedom of Information Act("FOIA"), 5 U.S.C. Sec. 552;and his rights to Due Process. In an amended complaint, filed on October 9, 1990, plaintiff repeated those claims,but added a claim that his property was taken without just compensation in violation of 5the Fifth amendment and requested damages.

Plaintiff was a prisoner during the Korean War from April 1951 until his release in August 1953. When he was released, plaintiff complained of hand tremors. At a medical examination conducted by the VA in January 19, 1954, plaintiff was diagnosed as suffering from (1) Parkinsonism and (2) Anxiety Reaction. On March 17, 1954, the Adjudication Division gave plaintiff a disability rating of 30 percent based on his medical condition of "Anxiety Reaction with Parkinson Features, Chronic Mod. Severe."

In 1981, former prisoners of war were notified of recent legislation allowing them to seek medical assistance at VA facilities. Amended Complaint at Par. 37. On February 14, 1983, plaintiff was examined by a neurologist in a VA facility. The examining physician, Dr. Bennett

Derby, was not a VA employee, determined that plaintiff suffered from "a marked neurological impairment" which "approached total disability for work as an attorney." Anended Complaint at Pars. 40, 41. In addition, the test results of the neurological examination were recorded. Thereupon,plaintiff filed a claim for veterans' benefits, contenting that this neurological impairment originated when he was a prisoner of war. On April 6, 1983, in a letter of S. Wohl, the VA rejected the claim based on on the plaintiff's outpatient medical records of October 15, ''982 through February 14, 1983, including the results of the tests performed by Dr. Derby, but did not mention Dr. Derby's diagnosis.

Plaintiff timely filed a Notice of Disagreement on April 5, 1984. Plaintiff waas then sent to a psychiatrist, Dr. Abeles, and another neurologist, Dr. Barrett. Based on those examinations, in a letter dated October 16, 1984, Robert Schmidt, Adjudication Officer, notified plaintiff that his nervous condition would be increased to a 50 percent disability rating. Plaintiff disagreed ith this determination and argued that he was entitled to a higher rating based on the aggregate of his medical conditions: hand tremors and neurological disorder. The Board of Veterans Appeals ("Board" or "BVA") disagreed. The Board affirmed the determination of the VA, finding that the tremors and the neurological disorder were part of a single disability, only entitling plaintiff to a 50 percent disability rating.

On June 7, 1991, plaintiff sought to file a second amended complaint in Sugrue 1 to name Robert Schmidt, an Assistant Adjudication Officer at the VA's New York

Regional Office, S. Wohl[1],and certain unidentified nts (collectively "the individual defendants"). On the same day -- June 7 -- plaintiff filed an identical complaint in Sugrue 11 against the VA the individual defendants to prevent expiration of the statute of limitations. Plaintiff now moves this Court for leave to file his proposed second amended complaint in Sugrue 1.

The government opposes plaintiff's motion to amend the complaint in Suugrue and cross-moves to dismiss both actions under Fed. R. Civ. P. 12(b)(1) and (b)(6) and , in the alternative, for summary judgment under Fed. R. Civ. P. 56 in both actions[2]. For the following reasons, plaintiff's motion to amend the complaint in Sugrue 1 is denied, and the governments motion to dismiss Sugrue 1 and 11 for lack of subject matter jurisdiction is granted.

DISCUSSION

Plaintiff asserts four grounds for relief against the VA in Sugrue 1 and against the VA and the individual

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[1] According to the government, S Wohl died on December 27, 1985, six years to the commencement of Sugrue 11.

[2] The government also argues that the United States Attorney Generalwas not served with the summons and complaint in Sugrue 1. However, as plaintiff correctly points out, the Attorney General was timely served on October 9, 1990, as indicated on the receipt card attached to the Summons.

defendants in Sugrue 11, alleging that they violated (1) the Privacy Act ("PA"); (2) the Freedom of Information Act ("FOIA"); (3) The Due Process clause of the Fifth Amendment; and (4) the Takings Clause of the Fifth Amendment. However, since the plaintiff seeks, in eessence, judicial review of his disability rating and of his benefits award,all four claims for relief must be dismissed for lack of subject matter jurisdiction.

All of the plaintiff's claims stem from his contention that various internal procedures of the VA entitled him to a complete neurological examination by the Departmeent of Medicine and Surgery of the VA which the BVA overlooked in denying him veteran's benefits.[3] Plaintiff's PA challenge is premised on the fact that the BVA did not include the information which an examination would have revealed. Pl's memo. of Law in Opp'nto Def's Motions to Dismiss at 30 ("Memo. in Opp'n"). The FOIA claim likewise challenges his disability rating on the ground that the VA failed to promulgate a regulation thatt two claimed disabilities --namely, a neurological condition of essential tremors a a disability of anxiety disorder -- would be considered part of a single sisability. Memo. in Opp'n at 41. Plaintiff's Procedural Due Process claim is based on the Secretary's failure to afford him a complete neurological examination which potentially could increase

---

[3] The regulations promulgated by the VA provide for medical examinations of appplicants for veterans' benefits. 38 C.F.R. Sec. 3.326. In this case, plaintiff was examined by two neurologists: DR. Derby on February 14, 1983 and Dr. Barrett in 1984. However, plaintiff contends that he should have undergone a complete neurological examination.

his disability rating.[4] Memo in Opp'n at 46-47, 51-52. Because this court is kprecluded from reviewing VA determinations of benefits awards of of disability ratings, this action must be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1).

> Section 511 of title 38 provides:
>
> > The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans. . . . Subject to [the exceptions listed in] subsection (b), *the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court*, whether b an action in the natur of mandamus or otherwise.

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[4] In addition, plaintiff argues that the reduction off benefits for his hand tremors that he received in 1954 constutes a taking. Under 38 U.S.C. sec. 110, a disability which has been in effect for twenty years can only be reduced upon a showing of fraud. Plaintiff apparently believes that the Secretary reduced his disability rating for the hand tremors when he combined plaintiff's neurological condition with his hand tremors. However, the fallacy of this argument readily apparent since plaintiff's 30% disability rating was increased to 50% based on his anxiety disorder, which already included the disability rating associated with with plaintiff's hand tremors. Accordingly, plaintiff's disability rating for his hand tremors was never reduced.

38 U.S.C. Sec. 511(a) (emphasis added).[5]

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[5] None of the four exceptions enumerated in subsection (b) of section 511 is applicable to this case. Subsection (b) allows judicial review:

> (1) by the Court of Appeals jfor the Federal Circuit of alleged violation of FOIA, 5 U.S.C. Sec 552(a)(1), (agencymust publish its precedures in the Federal Register) and Sec. 553 (agency must publish proposed rules in Federal Register) in accordance with 38 U.S.C. Sec. 502. While plaintiff raises a FOIA claim under 5 U.S.C. Sec. 552(a)(1), only the Federal Circuit may have jurisdiction over that challenge;
> (2) of cases involving life insurance benefits under 38 U.S.C. Sec. 1975, 1984;
> (3) of cases involving housing and small business loans under Chapter 37 of Title 38, 38 U.S.C. Sec. 3701-3751; and
> (4) by the Court of Veterans Appeals uner Chapter 72 of Title, but jonly in cases where a veteran filed with the BVA, on or after November 18, 1988, a notice of disagreement with the decision of the VA. Pub.L. No.100-687, Sec. 402, 102 Stat. 4113, 4122. In this case, plaintiff may not avail himself of that appellate procedure because he filed a notice of disagreement in 1984.

Thus, this Court does not have subject matter jurisdiction over this action under any of these jfour exceptions.

In *Johnson v. Robison*, 415 U.S. 361 (1974), the Court distinguished between a "review of those decisions of law or fact that arise in the *administration* by the [VA] of a *statute* providing benefits for veterans" and questions of law that "arise under the Constitution, not under the statute whose validity is [being] challenged." *Id.* at 367 (emphasis in original). The Court explained that "[a] decision of law or fact 'under' a statute is made by the [Secretary] in the interpretation or application of a particular provision of the statute to a particular set of facts." *Id.* It is such decision which is barred from judicial consideration under 38 U.S.C. Sec 511(a).

In *Johnson*, a conscientious objector to the military draft brought a class action challenging the denial of veterans' educational bevefits to conscientious objectors,

veterans' educational benefits to conscientious objectors, who had completed two years of alternative civilian service, as violative of the First and Fifth Amendments. *Id.* at 363-64. In upholding the constitutionality of statutes relied upon by the VA, the Court held that secton 211 (now section 511) did not preclude judicial review of a constitutional challenge to a decision of Congress to create a statutory class entitled to benefits that does not include conscientious objectors. *Id.* at 367. That section only bars judicial of review of "the [Secretary's] interpretation or application of a particualar set of facts." *Id.* Thus, under *Johnson*, district courts have jurisdiction over actions involving facial challenges to the constitutionality of veterans' bevefits legislation -- i.e., statutes or regualations -- but lack jurisdiction to review the application of such legislation to the particualar fact of an individual case. *See also Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1500 (2d Cir. 1992) (distinguishing between facial and "as applied" challenges under *Johnson*). That the district court lacks subject matter jurisdiction to entertain constitutional challenges which are essentially attacks upon awards of veterans benefits, *see Pappanikoloaou v. Administrator of Veterans Admin.*, 762 F.2d 8,9 (2d Cir. 1985) (no subject matter jurisdiction over a due process challenge), *cert. denied*, 474 U.S. 851 (1985). Thus, plaintiff's challenges to his disability rating premised on the PA, the FOIA, and the Due Process and Takings Clauses are attempts to circumvent 38 U.S.C. Sec 511(a) by seeking relief on a constitutional claim arising our of a determination concerning veterans' benefits and are dismissed for lack of subject matter jurisdiction.

The plaintiff's reliance upon *Eastern Paralyzed Veterans Assn., Inc.v. Veterans' Admin.*, 762 F. Supp. 539 (S.D.N.Y. 1991) is misplaced and is clearly distinguishable. That was a class action on behalf of spinal cord injured patients at one VA medical center in which it

was alleged that the members of the proposed class were denied rights and benefits provided other spinal cord injured patients at other VA medical centers, thereby depriving them of equal protection and due process. *Id.* at 540-41. In denying the defendants' motion to dismiss for lack of subject matter jurisdiction, the court drew the distinction identified in *Johnson v. Robison, supra.* The court emphasized that the plaintiff was not challenging the medical treatment afforded any specific individual, and recognized the continued authority of *Pappanikoloaou* that:

> To the extent the complaint seeks damages for the VA's denial of due process in handling his claim, we agree with those circuits that have held that one may not circumvent [Sec 511(a)] by seeking damages on a constitutional claim arising out of a denial of benefits. (citations omitted).

Eastern Paralyzed, 762 F.Supp. at 542 (quoting *Pappanikoloaou*, 762 F.2d at 9). In this case, plaintiff seeks judicial review of his individual veterans' benefits determination which is clearly barred by section 511. Plaintiff also cites two lower court decisions which entertained procedural due process claims against the VA, *Beauchesne v. Nimmo,* 562 F. Supp. 250, 253-54 (D. Conn. 1983); *Dumas v. Cleland*, 486 F.Supp. 149, 151-52 (D. Vt. 1980); those cases, however, have been displaced by *Pappanikoloaou*. Accordingly, plaintiff's claims against the VA through defendant Secretary are dismissed for lack of subject matter jurisdiction.

The Individual Defendants

In Sugrue II, plaintiff asserts a claim for releif

against S. Wohl, Robert J. Schmidt and other unnamed defendants in their individual capacities (collectively "the individual defendants"), for "render[ing] effectively unavailable the [] due process rights [of the Fifth Amendment] and the procedural safeguards [of the PA and FOIA]." The individual defendants are nemed in this action solely for their alleged act or omissions in denying plaintiff's application for an increased disability rating. Apparently, plaintiff seeks damages against those VA employees in their individual capacity under *Bivens v. Sox Unknown Named Agents of Federal Bureau of Narcotics*, 403, U.S. 388 (1971), for an alleged due process violation. *Davis v. Passman*, 442 U.S. 228, 248-49 (1979).

In light of *Bush v. Lucas*, 462. U.S. 367 (1983) and *Schweiker v. Chiliky*, 487 U.S. 412 (1988), this Court concludes that a *Bivens* claim cannot lie against VA employees in setting the level of veterans' benefits. In *Bush* , the Court refused to recognize a *Bivens* claim in the Federal employment context because "special factors counsel[ed] hesitation" to create a new remedy where Congress provided for adequate remedies for constitutional violations. 462 U.S. at 388-89. Likewise, in *Schweiker*, the Court refused to recognize a *Bivens* claim against federal employees who initially denied social security benefits to the plaintiffs. 487 U.S. at 417-18. The Couert held that the broad remedial structure of that statute was a " special factor"counselling against creating a new remedy. *Id.* at 423.

Here, the lack of remedies afforded by C ongress and the policies iunderlying the lack of judicial review dictates that individual VA employeesbe immune from a *Bivens* suit. Allowing a disgruntled veteran to sue VA employees who apply veterans legislation in the course of their duties would severely undermine Congress' intent in precluding judicial review of challenges ot veterans'

benefits legislation. As the Court noted in *Johnson v. Robison*, the dual purpose of non-reviewability of VA determinations is:

> (1) to insure that veterans' beneftis claims will not burden the courts and the [VA] with expensive and time-consuming litigation, and
> (2) to insure that the technical and complex determinations and applications of [VA] policy connected with veterans' benefits decisions will be adequetly and uniformly made.

415 U.S. 361, 370 (1974).

It is clear that these purposes would be frustrated if VA employees could be sued in their individual capacity for making veterans' benefits determinations. Instead of flooding already overflowing court dickets with appeals of adverse VA determinations, veterans would commence actions against individual VA employees. In addition, by entertaining lawsuits against VA employees, district courts could affect the "complex" determinations of those employees in deciding to award or deny veterans' benefits for fear of personal liability. Consequently, it is clear that congressional inaction was not inadvertent, and plaintiff cannot recover damages against the individual defendants.[6]

Motion to Amend

Plaintiff moves to amend his complaint in Sugrue I to name the individual defendants who were named as defendants in

---

[6] The individual defendants would also appear to have qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Sugrue II. While the denial or grant of a motion to amend is within the descretion of the district court, *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 46 (2d Cir. 1983) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)), "leave shall be freely given when justice so requires." Fed. R.Civ.P. 15(a). In *Foman*, the Court stressed the importance of liberally granting leave to amend, unless the court finds "undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] *futility of amendment*." 371 U.S. at 182 (emphasis supplied). Cognizant of the liberal amendment policy of the Federal Fules in general, plaintiff's motion to amend must still be denied because it is clear, based on the dismissal of those identical claims in Sugrue II, that the amendment would be futile.

For the foregoing reasons, plaintiff's motion to amend the complaint in Sugrue I is denied, and the government's motion to dismiss both Sugrue I and Sugrue II as against the VA and the individual defendants is granted.

SO ORDERED.

Dated: Brooklyn, New York
December 18th, 1992

s/
I. Leo Glasser, U. S. D. J.

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
DANIEL SUGRUE,

Plaintiff

- against -

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, and S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X and MARY DOES 1-X, the true names of the said DOE defendants being unknown to the plaintiff at this time,

Defendants

----------X

PLAINTIFF'S MOTION TO AMEND FINDINGS OF FACT
AND TO AMEND OR ALTER JUDGMENT ACCORDINGLY

Civil Action
No. CV-90-1972
No. CV-91-2041
(Glasser, J.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
DANIEL SUGRUE,
Plaintiff

- against -

EDWARD J. DERWINSKI, SECRETARY OF VETERAN AFFAIRS, and S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X and MARY DOES 1-X, the true names of the said DOE defendants being unknown to the plaintiff at this time,

Defendants

----------x

Civil Action
No. CV-90-1972
No. CV-91-2041
(Glasser, J.)

NOTICE OF MOTION

P LEASE TAKE NOTICE that upon the annexed declarations, the pleadings filed in the above entitled actions on behalf of the plaintiff, plaintiff's memorandum of law in oppostion to defendants motions in the above entitled actions, plaintiff will move this Court before the entitled actions, plaintiff will move this Court before the Honorable I. Leo Glasser, United States District Judge, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, 11202 on the 5th day of February, 1993, at 9:30 a.m., or as soon thereafter as counsel can be heard, on plaintiff's motion pursuant to Rules 52(b), 59(e), and 60(b), of the Federal Rules of Civil Procedure, to have the Court amend its findings of fact or to make additional findings and to alter or amend the judgment accordingly, and for such other and further relief as the Court deems just and proper.

Dated: Queens, New York
January 13, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

DANIEL SUGRUE,

Plaintiff

- against -

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, and S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X and MARY DOES 1-X, the true names of the said DOE defendants being unknown to the plaintiff at this time,

Defendants
----------X

Civil Action
No. CV-90-1972
No. CV-91-2041
(Glasser, J.)

DECLARATION OF KEVIN P. QUILL IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND FINDINGS OF FACT AND TO AMEND OR ALTER JUDGMENT ACCORDINGLY

KEVIN P. QUILL declares as follows:

1. On February 14, 1983, plaintiff went to the VA Outpatient Clinic which, he was recently advised he could avail himself of as a former prisoner of war. The examining physician was Dr. Bennett M. Derby, a board certified neurologist, who advised plaintiff that he suffered from a marded "neurological" impairment which approached total disability for work as an attorney. It is noted in the opinion of the court that the doctor, Dr. Derby, "was not a VA employee" (p.3,linr 2). The VA has never questioned his authority or argued that his diagnosis was not perfectly accurate. It wasa based on this diagnosis that plaintiff filed
claim for neurological sisorder on the following day.

February 15, 1983. By form letter dated April 6, 1993, signed by S. Wohl, Adjudication-Officer, plaintiff was advised that the "evidence does not warrant any change" in the agency's previous determination. It is of the most critical importance to plaintiff's alleged causes of action in this Court that the Wohl determination was made wothout referral for a neurological examination for disability evaluation in the Department of Medicine and Surgery and in accordance with their examination procedures because they were the only Department having the delegated authority to conduct such an examination. As a former prisoner of war he was entitled to no less, and it is the refusa; of the VA to lmake the referral to their own neurologists in the Department of Medicine and Surgery, and not the particular diagnosis which might ensue, whic is the issue.

2. The statement that plaintiff filed Notice of Disagreement on April 5, 1984 is correct. This disagreement with Wohl's disposition is the only disagreement submitted by or on behalf of plaintiff. The further statement in the Court's opinion
, page 3, as to what happened next on plaintiff's neurological claim is clearly erroneous. It states that after filing the notice of disagreement on April 5, 1984, plaintiff "was then sent to a psychiatrist, Dr. Abeles, and another neurologist, Dr. Barrett." The statement jis untrue. Plaintiff was not "then" or at any time referred to Dr. Barrett or to any other neurologist by the VA. These are errors of fact.

3. The further statement that "Based on those examinations, in a letter dated October 16, 1984, Robert Schmidt, Adjudication Officer, notified plaintiff that his nervous condition would be increased to a 50 percent disability rating." (Opinion, p.3; emphasis added), is also erroneous, in that Dr. Barrett did not examine plaintiff until 1987. See Dr. Barrett's letter opinion of October 14, 1987, almost 3 years after Schmidt's letter of Ectober 16, 1984. These errors are obviously premised on the same errors of fact as in "2" above.

4. The statement that plaintiff disagreed with this "determination" os promised on the erroneous assumption of fact that plaingiff had undergone a neurological examination at the behest of the VA to determine the issue. Opinion, p.3.

5. The further statement in the same sentence as paragraph "4" above that plaintiff argued that he was entitled to a higher rating is untrue in fact. Nowhere in plaintiff's complaints, brief, or other documents submitted to the Court, can it be found that plaintiff papers contain. That plaintiff was entitled to a neurological examination for a disability evaluation in the Department of Medicine and Surgery on his neurological claim, the only claim filed by him, he has argued most strenuously and at length.

6. The further statement contained in the same sentence that plaintiff sought a higher rating "based on the aggregate of his medical conditions: hand tremors and neurological disorder." is not true and is erroneous if fact. It is not to found anywhere in plaintiff's complaints, brief, or other documents submitted to the court. This is an erroneous statement of what in fact plaintiff's papers contain. See also "5" above.

7. The last sentence on the page (Opinion, p.3) refers to a "finding that the tremors and the neurologival disorder were part of a single disability" is literally true. Tremors are a neurological disorder as diagnosed by Dr. Derby and by Dr. Barrett but was never the subject of a neurological examination for disability evaluation in the Department of Medicine and Surgery or consequent finding by the VA.

8.The plaintiff has nowhere in his pleadings alleged that "the VA in setting his disability rating at 50 percent and refusing to revise that disability rating." This statement is untrue in fact. Wohl's determination as contained in his letter of Aprol 3, 1983 without benefit of a neurological examination for disability evaluation in the Department of Mediciane and Surgery violated the Privacy Act. It is the Procedural denial of such examination that was violative of the Privacy Act and this was more than a year before the Schmidt determination and its increased rating.

9. It was also this procedural denial of a neurological examination for disability evaluation in the Department of Mediciane and Surgery that was violative of the due process clause and effectively denied plaintiff a hearing on the merits of his claim in that agency.

10. The denail of these procedural rights whereby to frustrate and to thwart the vindication of plaintiff's claim was the baasis of plaintiff's cause of action under Rauccio and

Barrett and was again wholly unrelated to the results which might ensue had such procedural denials not occurred.

11. The plaintiff has never alleged that the Freedon of Information Act had anything to do with disability rating, percentages, or the refusal to revise such ratings. It is an erroneous statement of what in fact plaintiff's papers contain. It is not to be found anywhere in plaintiff's complaints, brief, or other documents submitted to the Court.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge, information and belief.

Dated: Queens, New York
January 13, 1993

KEVIN P. QUILL

The above motion to amend finding and to amend or alter judgment accordingly was denied by decision of the distict Court dated March 26, 1993.

The decretal provisions of the memorandum and order read as follows:

" For the foregoing reasons, plaintiff's motion is denied and this Court's prior decision is amended, for clarification purposrs only, as follows:

(1) the first two lines of 808 F.Supp at 948 should read:

physician, Dr. Bennett Derby, who was a VA employee, determined that plaintiff

(2) the second and third sentences of the first full paragraph on page 948 should read:

Plaintiff
was sent to a psychiatrist, Dr. Abeles. Based on this examination, ina letter ...; and

(3) the second sentence of footnote 2 on page 948 should read:

In this case, plaintiff was examined by two neurologists; Dr. Derby on February 14, 1983 and by Dr. Barrett in 1987.

Supreme Court, U.S.
FILED
MAY 5 1995
OFFICE OF THE CLERK

No. 94-1317

In the Supreme Court of the United States

OCTOBER TERM, 1994

DANIEL SUGRUE, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction over petitioner's statutory and constitutional challenges to the Veterans' Administration's disability benefit determination.

2. Whether petitioner's action against officials of the Department of Veterans Affairs in their individual capacities failed to state a claim upon which relief could be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1317

DANIEL SUGRUE, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 26 F.3d 8. The initial opinion of the district court (App., *infra*, 12a-23a) is reported at 808 F. Supp. 946. The order of the district court denying reconsideration and amending the opinion (App., *infra*, 24a-31a) is unreported.[1]

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[1] Due to a number of omissions and typographical errors in petitioner's appendix, we have elected to reprint the opinions and orders in an appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1994. A petition for rehearing was denied on August 31, 1994. On January 18, 1995, Justice Ginsburg entered an order extending the time within which to file a petition for a writ of certiorari to and including January 28, 1995 (a Saturday). The petition for a writ of certiorari was filed on January 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a veteran of the United States Army who was a prisoner of war in Korea between April, 1951, and August, 1953. App., *infra*, 13a. Following his release, petitioner complained of hand tremors, and a 1954 medical examination conducted by the Veterans' Administration (VA)[2] diagnosed petitioner as suffering from "Parkinsonism" and "Anxiety Reaction." *Ibid.* His condition was determined by the VA's adjudication division as constituting a 30% disability. *Id.* at 13a-14a.

In February, 1983, petitioner sought medical care at a VA facility. App., *infra*, 14a. Petitioner was examined at that time by a VA neurologist, who determined that petitioner suffered from "a marked neurological impairment" that "approached total disability for work." *Id.* at 14a, 30a. Following that diagnosis, which was recorded in petitioner's medical

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[2] The Veterans' Administration was redesignated as the Department of Veterans Affairs by the Department of Veterans Affairs Act, Pub. L. No. 100-527, § 2, 102 Stat. 2635 (1988). Both the Department and the Administration will be referred to as the "VA."

records, petitioner filed with the VA a claim for additional disability benefits. *Id.* at 14a. On April 6, 1983, in a letter from respondent S. Wohl, the VA rejected petitioner's claim on the ground that the evidence in petitioner's medical records did not warrant any change in petitioner's prior disability determination. *Ibid.*

Thereafter, petitioner filed a timely Notice of Disagreement on April 5, 1984. App., *infra*, 14a; see 38 U.S.C. 4005(a) and (b) (1982). Respondent Robert J. Schmidt, the regional VA adjudication officer, responded to the Notice of Disagreement by offering petitioner a neuropsychiatric examination. App., *infra*, 3a, 14a, 30a; see 38 U.S.C. 4005(d)(1) (1982). After that examination, respondent Schmidt notified petitioner on October 16, 1984, that, based on the new examination, his disability rating would be increased from 30% to 50%. App., *infra*, 14a, 30a. Dissatisfied with that result, petitioner appealed to the Board of Veterans' Appeals (BVA). *Id.* at 14a; see 38 U.S.C. 4005(a) (1982). Following a hearing at which petitioner was represented by counsel, the 50% disability determination was affirmed on June 10, 1988. App., *infra*, 3a, 14a-15a, 29a n.4.

2. On June 11, 1990, petitioner filed suit in the United States District Court for the Eastern District of New York. App., *infra*, 13a. Petitioner alleged that the VA and various identified and unidentified VA employees (1) failed to maintain his complete medical record by not performing the complete neurological examination that petitioner requested, in violation of the Privacy Act of 1974, 5 U.S.C. 552a; (2) failed to publish the criteria used to determine his disability rating in the *Federal Register*, in violation of the Freedom of Information

Act (FOIA), 5 U.S.C. 552; and (3) failed to follow VA regulations by not providing him with a complete neurological examination which led to an inaccurate disability determination, in violation of petitioner's Fifth Amendment rights to due process and freedom from the taking of property without compensation. App., *infra*, 4a, 16a-17a. Petitioner's complaint sought relief that would place him "in the position he would have occupied but for the * * * unlawful acts and conduct [of the respondents] and mak[e] him whole for all entitlements and benefits he would have received but for [said] unlawful acts and conduct." *Id.* at 30a.

The district court dismissed petitioner's claims against the VA for lack of subject matter jurisdiction, finding that 38 U.S.C. 511(a)[3] precluded judicial review of claims affecting VA determinations of disability ratings. App., *infra*, 17a-21a. The court also dismissed the claims against the individual defendants for failure to state a claim, holding that an action brought pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), could not lie against VA employees arising out of a disability benefit level determination because the clear intent of Congress to restrict judicial review of decisions of the VA regarding benefits would be severely undermined if veterans were allowed to sue individual VA employees for their role in making benefits determinations. App., *infra*, 21a-23a.

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[3] Because portions of Title 38 were renumbered in 1991 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378, references to sections of that title will be to the 1991 United States Code Supplement unless otherwise noted.

3. The court of appeals affirmed. App., *infra*, 1a-11a. With respect to the claim against the VA, the court of appeals held that under 38 U.S.C. 511(a) the district court did not have jurisdiction over petitioner's claim even though petitioner framed his action seeking judicial review of the VA's disability determination in constitutional and statutory terms. App., *infra*, 4a-7a. With respect to the claims against the individual VA employees, the court held that, since Congress made it clear that the BVA's review of disability determinations was exclusive, no private right of action could lie against government officials with respect to the assignment of a disability rating in an individual case. *Id.* at 9a-10a. The court found that the review available to petitioner provided him "meaningful remedies in a multitiered and carefully crafted administrative process" and indicated that the failure of Congress to provide a remedy against individual VA employees was not an oversight. *Id.* at 10a.

ARGUMENT

1. Petitioner argues (Pet. 4-5, 10, 12, 25-27) that the district court had jurisdiction over his statutory and constitutional claims. Petitioner first contends (Pet. 9-14, 26) that the courts below erred in measuring the district court's jurisdiction under the statute in force at the time petitioner filed his suit rather than the statute in force at the time he filed his Notice of Disagreement.[4] But see *Landgraf* v.

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[4] 38 U.S.C. 211 (1982) was amended by the Veterans' Judicial Review Act, Pub. L. No. 100-687, § 101, 102 Stat. 4105-4106 (1988), and was codified at 38 U.S.C. 211 (1988). Amended Section 211 was later recodified without substantive change at

USI Film Prods., 114 S. Ct. 1483, 1501-1502 (1994). Because the result in this case is unaffected by which statute is applied, we do not address that claim. Instead, assuming *arguendo* that 38 U.S.C. 211 (1982) governed the district court's jurisdiction at the time it dismissed petitioner's suit, the courts below correctly determined that they did not have jurisdiction to consider his claims.

Section 211(a) provided that "the decisions of the [Secretary] on any question of law or fact under any law administered by the [VA] providing benefits for veterans * * * shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." As this Court noted, "Congress established no judicial review for VA decisions until [the enactment of the Veterans' Judicial Review Act (VJRA)], only then removing the VA from what one congressional Report spoke of as the agency's 'splendid isolation.'" *Brown* v. *Gardner*, 115 S. Ct. 552, 557 (1994).[5]

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38 U.S.C. 511. See Pub. L. No. 102-83, § 2(a), 105 Stat. 388-389 (1991).

[5] VJRA was enacted on November 18, 1988. If petitioner had filed a Notice of Disagreement after the enactment of VJRA, his claims could have been considered by the Court of Veterans Appeals. See 38 U.S.C. 511(b)(4), 7251 note; 38 C.F.R. 20.1201. However, petitioner's Notice of Disagreement was filed prior to enactment of VJRA and thus that court has no jurisdiction over his claims. See *Belarmino* v. *Derwinski*, 931 F.2d 1543, 1544 (Fed. Cir. 1991); *Prenzler* v. *Derwinski*, 928 F.2d 392, 393-394 (Fed. Cir. 1991). Petitioner, however, may request that his claim be reopened in order to submit "new and material evidence." 38 U.S.C. 5108, 7104(b); see App., *infra*, 31a. The VA's decision on that request would be appealable to the Court of Veterans Appeals. Cf. 38 C.F.R. 20.1105.

Petitioner claimed (App., *infra*, 3a-4a, 16a) that the final decision of the Secretary was made in violation of the Privacy Act and FOIA because the VA did not maintain petitioner's records accurately and because the VA relied on materials which ought to have been published in the *Federal Register*. Those failures allegedly affected the Secretary's disability determination. Petitioner's claims, however, are collateral attacks on a final benefits decision under a law administered by the Secretary and thus cannot be reviewed under Section 211. See, *e.g.*, *Gott* v. *Walters*, 756 F.2d 902, 904 n.1, 907 n.6, 910 (Scalia, J.), vacated and dismissed, 791 F.2d 172 (D.C. Cir. 1985); *Pellerin* v. *Veterans Admin.*, 790 F.2d 1553, 1555 (11th Cir. 1986); *Rosen* v. *Walters*, 719 F.2d 1422, 1424-1425 (9th Cir. 1983); cf. *Heck* v. *Humphrey*, 114 S. Ct. 2364, 2371-2373 (1994).

Nor did the district court have jurisdiction over petitioner's due process claims (Pet. 12, 14-15, 24-29). Petitioner alleges (Pet. 15, 25-28) that the failure to perform a neurological examination and the failure to refer to regulations when denying him full disability benefits constituted violations of due process because VA regulations were violated and the violation impeded an accurate resolution of his claim. Further, petitioner argues (Pet. 12, 28-29) that the Secretary effected a taking by denying his claim. Whatever the merits of those claims, they are in essence challenges to the application of "particular provision[s] * * * to a particular set of facts" and this Court has made clear that such challenges are precluded. *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974); see *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 n.3 (1985) (jurisdiction available for attacks

"on the operation of the claims *system*[]" (emphasis added)).

2. Petitioner claims (Pet. 16-23) that the court of appeals erred in declining to recognize a *Bivens* action for due process violations of VA employees arising out of disability benefit determinations. Petitioner does not cite (nor have we been able to locate) any other court of appeals' decision that has considered the question of a *Bivens* action in these circumstances.

This Court has generally refused to recognize *Bivens* claims in connection with federal benefits determinations. See *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); cf. *Bush* v. *Lucas*, 462 U.S. 367 (1983). This is because such programs usually contain integrated review schemes to address inaccurate determinations. See *Schweiker*, 487 U.S. at 427-428; *Lucas*, 462 U.S. at 388; cf. *FDIC* v. *Meyer*, 114 S. Ct. 996, 1005 (1994) (recognition of *Bivens* action influenced by the existence of other remedies). Significant administrative remedies were available to petitioner for review of the VA's decision regarding his disability level. In response to petitioner's Notice of Disagreement, he was provided with an additional medical examination, which resulted in the increase of his disability rating from 30% to 50%. App., *infra*, 14a. When petitioner continued to disagree with the VA's diagnosis of his condition, the dispute was reviewed by the BVA, which ultimately affirmed the decision of the VA regarding his disability level after a hearing at which petitioner was represented by counsel. *Id.* at 3a.

Although petitioner could not have this determination reviewed by a district court of the newly formed Court of Veterans Appeals, this restriction was

consonant with the prevailing congressional view that additional avenues for litigation were unnecessary and counterproductive. See *Walters*, 473 U.S. at 323-326; *Johnson*, 415 U.S. at 370. The ultimate creation of the Court of Veterans Appeals, following years of congressional attention to the issue of judicial review of VA determinations, "suggest[s] that Congress' failure to create a remedy against individual employees of the VA was not an oversight." App., *infra*, 10a; cf. *Schweiker*, 487 U.S. at 425-426; *Lucas*, 462 U.S. at 389. "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [this Court has] not created additional *Bivens* remedies." *Schweiker*, 487 U.S. at 423.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 483, 686, DOCKETS 93-6137, 93-6139

DANIEL SUGRUE, PLAINTIFF-APPELLANT

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, AND S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X AND MARY DOES 1-X, THE TRUE NAMES OF THE SAID DOE DEFENDANTS BEING UNKNOWN TO THE PLAINTIFF AT THIS TIME, DEFENDANTS-APPELLEES

Argued Oct. 20, 1993

Decided May 17, 1994

Before: MAHONEY and WALKER, Circuit Judges, and METZNER* District Judge.

MAHONEY, Circuit Judge:

Plaintiff-appellant Daniel Sugrue appeals from a judgment entered January 4, 1993 in the United States District Court for the Eastern District of

* The Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, sitting by designation.

New York, I. Leo Glasser, *Judge*, that dismissed Sugrue's actions against the Department of Veterans Affairs[1] for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), and against several named and unnamed employees of the VA (the "VA Employees") for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). *See Sugrue v. Derwinski*, 808 F.Supp. 946 (E.D.N.Y.1992) (opinion supporting judgment), as amended by *Sugrue v. Derwinski*, No. CV-90-1972, slip op. at 7 (E.D.N.Y. Mar. 26, 1993). Sugrue's complaints against the VA and the VA Employees alleged that the defendants had violated his rights under the Fifth Amendment to the Constitution, the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552, in determining his disability benefit award.

We affirm.

Background

This dispute stems from long term injuries sustained by Daniel Sugrue when he was held as a prisoner of war. During the Korean War, Sugrue, then a soldier in the United States Army (the "Army"), was a prisoner of war from April 1951, when he was taken captive, to August 1953, when he was released at the conclusion of that conflict. Sugrue was honorably discharged from the Army in 1953. At that time, an Army medical examination revealed that

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[1] The Veterans' Administration, the predecessor to the Department of Veterans Affairs, was redesignated as the Department of Veterans Affairs by the Department of Veterans Affairs Act, Pub.L. No. 100-527, § 2, 102 Stat. 2635, 2635 (1988). Both the Department and the Administration are hereinafter referred to as the "VA".

Sugrue suffered from "Parkinsonism" and "Anxiety Reaction." In that connection, a VA adjudication division rated him as thirty percent disabled.

In 1981, the VA advised former prisoners of war of legislation enabling them to obtain medical care at VA facilities. *Id.* On February 14, 1983, Sugrue availed himself of this service and underwent a medical examination at a VA facility by a neurologist retained by the VA. According to Sugrue, the neurologist determined that Sugrue, a lawyer, suffered from a neurological disorder resulting in near "total disability for work as an attorney."

Sugrue filed a claim with the VA based upon this diagnosis. By letter dated April 6, 1983, S. Wohl, one of the VA Employees, rejected Sugrue's claim on the ground that "the evidence d[id] not warrant any change" in the prior disability determination.

On April 5, 1984, Sugrue initiated an administrative appeal of this finding by filing with the VA a notice of disagreement challenging the VA's failure to raise his disability rating. *See* 38 U.S.C. 4005 (1988) (recodified as 38 U.S.C. § 7105 (Supp. III 1991)). By letter dated April 11, 1984, Robert J. Schmidt (another of the VA Employees), a regional VA adjudication officer, invited Sugrue to undergo a neuropsychiatric examination. Following examinations by a psychiatrist and a neurologist, the VA increased Sugrue's disability rating to fifty percent. Sugrue continued to disagree with his disability rating, and pursued his case before the Board of Veterans Appeals (the "BVA"). After a hearing at which Sugrue's claim was presented by counsel, however, the BVA affirmed his fifty percent disability rating.

Sugrue then filed the instant actions, contending that the VA and the VA Employees violated (1) the

Privacy Act, 5 U.S.C. § 552a, as a result of the VA's failure to maintain its record regarding Sugrue "with accuracy, relevance, timeliness, and completeness, necessary to assure fairness to [Sugrue] in reaching its determination;" (2) the FOIA, 5 U.S.C. § 552, in that "[Sugrue's] claim and defendants [sic] adverse determination thereof was [sic] affected by matter required to be published in the Federal Register and not so published;" (3) the Fifth Amendment guarantee of due process; and (4) the Fifth Amendment prohibition against the taking of private property for public use without just compensation.

The district court dismissed the complaints, for lack of subject matter jurisdiction as to the complaint against the VA, *see Sugrue*, 808 F.Supp. at 950, and for failure to state a claim as to the complaint against the VA Employees. *See id.* at 951. The district court also denied Sugrue's motion to amend his complaint against the VA to add the VA Employees as individual defendants. *See id.*

This appeal followed.

Discussion

38 U.S.C. § 511 (Supp. III 1991) provides in pertinent part that:

> (a) The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . . Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to—

(1) matters subject to section 502 of this title;

(2) matters covered by sections 1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.

Section 502 relates to judicial review of rules and regulations to which reference is made by 5 U.S.C. § 552(a)(1) or 553 (regarding rules and regulations that federal agencies are required to promulgate by FOIA), but § 502 review is available only in the Court of Appeals for the Federal Circuit. Sections 1975 and 1984 relate to civil actions regarding life insurance. Chapter 37 relates to housing and small business loans.

Chapter 72 relates to the United States Court of Veterans Appeals, an Article I court established in 1988 that has "exclusive jurisdiction to review decisions of the [BVA]." 38 U.S.C. § 4052(a) (1988) (recodified as 38 U.S.C. § 7252(a) (Supp. III 1991)). However, that jurisdiction is available only as to "any case in which a notice of disagreement is filed under section 4005 [now § 7105] of title 38 . . . on or after the enactment of [Public Law No. 100-687; i.e., November 18, 1988]." Veterans' Judicial Review Act—Veterans' Benefits Improvement Act of 1988, Pub.L. No. 100-687, § 402, 102 Stat. 4105, 4122; *see also Prenzler v. Derwinski*, 928 F.2d 392, 393-94 (Fed.Cir.1991). As

indicated earlier, Sugrue filed his notice of disagreement on April 5, 1984.

Accordingly, none of the exceptions stated in § 511(b) apply in this case, and the governing rule is provided by § 511(a)'s bar of review of the VA's determination of Sugrue's benefit level "by any court, whether by an action in the nature of mandamus or otherwise." As Judge Glasser correctly ruled, this language prevented the district court from exercising subject matter jurisdiction over Sugrue's claims against the VA. *See Sugrue*, 808 F.Supp. at 949-50.

Section 511(a) is designed to (1) ensure that benefits claims will not burden the courts and the VA with litigation, and (2) promote the adequacy and uniformity of complex veterans' benefits decisions. *Johnson v. Robison*, 415 U.S. 361, 369-70, 94 S.Ct. 1160, 1166-67, 39 L.Ed.2d 389 (1974).[2] In *Johnson*, the Court distinguished between suits challenging the constitutionality of the statutes underlying veterans programs, to which § 511(a) does not apply (over which courts thus have jurisdiction), and actions of the VA under those statutes in determining qualification for benefits, to which § 511(a) does apply (over which courts therefore lack jurisdiction). *See Johnson*, 415 U.S. at 367-74, 94 S.Ct. at 1165-69; *Larrabee*, 968 F.2d at 1500.

Sugrue's claims against the VA challenge the VA's denial of a certain level of benefits to Sugrue based

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[2] Section 511 was enacted by the Department of Veterans Affairs Codification Act, Pub.L. No. 102-83, § 2(a), 105 Stat. 378, 388 (1991). It replaced, however, a substantially identical predecessor provision, *see* 38 U.S.C. § 211(a) (1988), that was construed in *Johnson*. *See Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1500 (2d Cir. 1992) (noting that 1970 version of § 211(a) substantially similar to current § 511(a)).

upon a disputed disability rating. His complaints seek "to place plaintiff in the position he would have occupied but for the . . . unlawful acts and conduct [of the VA and the VA employees] and mak[e] him whole for all entitlements and benefits he would have received but for [said] unlawful acts and conduct."

Although Sugrue's complaints invoke provisions of the Fifth Amendment and are styled in part as constitutional actions, the courts do not acquire jurisdiction to hear challenges to benefits determinations merely because those challenges are cloaked in constitutional terms. *See Pappanikoloaou v. Administrator of Veterans Admin.*, 762 F.2d 8, 9 (2d Cir.) (per curiam) ("one may not circumvent § [5]11(a) by seeking damages on a constitutional claim arising out of a denial of benefits") (collecting cases), *cert. denied*, 474 U.S. 851, 106 S.Ct. 150, 88 L.Ed.2d 124 (1985); *see also Larrabee*, 968 F.2d at 1500 (§ 511(a) "precludes judicial review of non-facial constitutional claims") (collecting cases). Similarly, neither the Privacy Act nor the FOIA may be used as a rhetorical cover to attack VA benefits determinations.

We turn to Sugrue's claims against the VA Employees. In accordance with *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), we decline, as did the district court, to find that a cause of action lies against the VA Employees in their individual capacities.

In *Bush*, an employee of the National Aeronautics and Space Administration sued the Director of the George C. Marshall Space Flight Center (the "Center") after the Director demoted the employee, allegedly in retaliation for publicly critical remarks made by the employee about the Center. The

employee sought damages for a claimed violation of his rights under the First Amendment. The Supreme Court noted that although *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and its progeny had established that the Constitution supports private causes of action against federal officials for constitutional torts, *see Bush*, 462 U.S. at 374, 103 S.Ct. at 2409, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service." *Id.* at 389, 103 S.Ct. at 2417. Accordingly, the Court declined to find a new private right of action for a federal employee when comprehensive federal legislation had already established "an elaborate remedial system that ha[d] been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 388, 103 S.Ct. at 2417.

In *Chilicky*, the Court rejected claims premised upon the denial of Fifth Amendment rights that were advanced by social security disability benefit recipients against federal and state officials who administered the disability benefit program. After detailing the multilayered remedial scheme available to benefits claimants under the social security disability program, the Court held that the case could not be reasonably distinguished from *Bush*, stating:

> Here, exactly as in *Bush*, Congress has failed to provide for "complete relief": respondents have not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits. The creation of a *Bivens* remedy would obviously

> offer the prospect of relief for injuries that must now go unredressed. Congress, however, has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were. Indeed, the system for protecting their rights is, if anything, considerably more elaborate than the civil service system considered in *Bush*.

487 U.S. at 425, 108 S.Ct. at 2468-69 (citations omitted); *cf. FDIC v. Meyer*, —- U.S. ——, ——, 114 S.Ct. 996, 1006, 127 L.Ed.2d 308 (1994) (declining to authorize *Bivens* actions against federal agencies).

In our view, the same reasoning applies in the context of veterans' benefits. Sugrue's action against the VA Employees is based solely upon their acts or omissions concerning the assigning of a disability rating, and hence a benefit level, to Sugrue. Congress has enacted a comprehensive remedial structure to address disputes regarding disability ratings and benefits claims by veterans.

A veteran claiming disability benefits from the VA enjoys "a beneficial non-adversarial system" of adjudicating veterans benefits claims in which the VA is "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R.Rep. No. 963, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795. For example, at the time when Sugrue's VA claim was under administrative consideration, the VA was required to assist claimants in obtaining evidence in support of their claims, 38 U.S.C. § 3007(a) (1988) (recodified as 38 U.S.C. § 5107(a) (Supp. III 1991)). Moreover, claimants were entitled to: (1) receive the benefit of the doubt in proving benefit claims, 38

U.S.C. § 3007(b) (1988) (recodified as 38 U.S.C. § 5107(b) (Supp. III 1991)); and (2) reopen disallowed claims by submitting new and material evidence. 38 U.S.C. § 3008 (recodified as 38 U.S.C. § 5108 (Supp. III 1991)).

As in *Bush* and *Chilicky*, the scheme of review for veterans' benefit claims provides meaningful remedies in a multitiered and carefully crafted administrative process. Further, the fact that Congress has explicitly foreclosed a remedy in Article III courts against the VA, *see* § 511(a), and the policies underlying that prohibition, *see Johnson*, 415 U.S. at 369-70, 94 S.Ct. at 1166-67, suggest that Congress' failure to create a remedy against individual employees of the VA was not an oversight. Finally, Congress has accorded frequent attention to the issue of judicial review of VA benefits determinations, and only in 1988 did it provide for a limited form of review when it established the United States Court of Veterans Appeals, an Article I court authorized to review BVA decisions. *See* Veterans' Judicial Review Act—Veterans' Benefits Improvement Act of 1988, Pub.L. No. 100-687, §§ 301-303, 102 Stat. 4105, 4113-22 (codified in scattered sections of 38 U.S.C.); H.R.Rep. No. 963 at 10-13, *reprinted in* 1988 U.S.C.C.A.N. at 5792-94 (recounting numerous previously unsuccessful attempts to enact judicial review of veterans benefits determinations). This history provides additional evidence that Congress has declined to enact the remedy that Sugrue asks us to create against the VA Employees. Following *Bush* and *Chilicky*, we will not create such a remedy when Congress has chosen not to do so.

Conclusion

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Nos. CV-90-1972; CV-91-2041

DANIEL SUGRUE, PLAINTIFF

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, DEFENDANT

DANIEL SUGRUE, PLAINTIFF

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, AND S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X AND MARY DOES 1-X, THE TRUE NAMES OF SAID DOE DEFENDANTS BEING UNKNOWN TO THE PLAINTIFF AT THIS TIME, DEFENDANTS

Dec. 18, 1992

MEMORANDUM AND ORDER

GLASSER, District Judge:

In two pending actions, plaintiff Daniel Sugrue alleges that the Department of Veterans Affairs ("VA") and its employees violated his constitutional

and statutory rights in determining his veterans' benefits award. Plaintiff moves to serve a second amended complaint in the first action, CV-90-1972 ("Sugrue I"), which is identical to a complaint already filed in the second action, CV-91-2041 ("Sugrue II"). The government moves to dismiss both Sugrue I and Sugrue II for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment. For the following reasons, the government's motion to dismiss is granted in both actions and the plaintiff's motion to amend his complaint in Sugrue I is denied.

FACTS

On June 11, 1990, plaintiff Daniel Sugrue, an attorney admitted to the New York bar in 1961, commenced an action against defendant Thomas Derwinski, Secretary of the VA, alleging that the VA in setting his disability rating at 50 percent and refusing to revise that disability rating, violated the Privacy Act ("PA"), 5 U.S.C. § 552a; the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552; and his rights to Due Process. In an amended complaint, filed on October 9, 1990, plaintiff repeated those claims, but added a claim that his property was taken without just compensation in violation of the Fifth Amendment and requested damages.

Plaintiff was a prisoner of war during the Korean War from April 1951 until his release in August 1953. When he was released, plaintiff complained of hand tremors. At a medical examination conducted by the VA on January 19, 1954, plaintiff was diagnosed as suffering from (1) Parkinsonism and (2) Anxiety Reaction. On March 17, 1954, the Adjudication Division gave plaintiff a disability rating of 30 percent

based on his medical condition of "Anxiety Reaction with Parkinson Features, Chronic Mod. Severe."

In 1981, former prisoners of war were notified of recent legislation allowing them to seek medical assistance at VA facilities. Amended Complaint at ¶ 37. On February 14, 1983, plaintiff was examined by a neurologist in a VA facility. The examining physician, Dr. Bennett Derby, who was not a VA employee, determined that plaintiff suffered from "a marked neurological impairment" which "approached total disability for work as an attorney." Amended Complaint at ¶¶ 40, 41. In addition, the test results of the neurological examination were recorded. Thereupon, plaintiff filed a claim for veterans' benefits, contending that this neurological impairment originated when he was a prisoner of war. On April 6, 1983, in a letter of S. Wohl, the VA rejected this claim based on plaintiff's outpatient medical records of October 15, 1982 through February 14, 1983, including the results of the tests performed by Dr. Derby, but did not mention Dr. Derby's diagnosis.

Plaintiff timely filed a Notice of Disagreement on April 5, 1984. Plaintiff was then sent to a psychiatrist, Dr. Abeles, and another neurologist, Dr. Barrett. Based on those examinations, in a letter dated October 16, 1984, Robert Schmidt, Adjudication Officer, notified plaintiff that his nervous condition would be increased to a 50 percent disability rating. Plaintiff disagreed with this determination and argued that he was entitled to a higher rating based on the aggregate of his medical conditions: hand tremors and neurological disorder. The Board of Veterans Appeals ("Board" or "BVA") disagreed. The Board affirmed the determination of the VA, finding that the tremors and the neurological disorder

were part of a single disability, only entitling plaintiff to a 50 percent disability rating.

On June 7, 1991, plaintiff sought to file a second amended complaint in Sugrue I to name Robert Schmidt, an Assistant Adjudication Officer at the VA's New York Regional Office, S. Wohl[1], and certain unidentified individuals as defendants (collectively "the individual defendants"). On that same day—June 7, 1991—plaintiff filed an identical complaint in Sugrue II against the VA and the individual defendants to prevent the expiration of the statute of limitations. Plaintiff now moves this Court for leave to file his proposed second amended complaint in Sugrue I.

The government opposes plaintiff's motion to amend the complaint in Sugrue I and cross-moves to dismiss both actions under Fed.R.Civ.P. 12(b)(1) and (b)(6) and, in the alternative, for summary judgment under Fed.R.Civ.P. 56 in both actions.[2] For the following reasons, plaintiff's motion to amend the complaint in Sugrue I is denied, and the government's motion to dismiss Sugrue I and Sugrue II for lack of subject matter jurisdiction is granted.

DISCUSSION

Plaintiff asserts four grounds for relief against the VA in Sugrue I and against the VA and the individual defendants in Sugrue II, alleging that they violated

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[1] According to the government, S. Wohl died on December 27, 1985, six years prior to the commencement of Sugrue II.

[2] The government also argues that the United States Attorney General was not served with the summons and complaint in Sugrue I. However, as plaintiff correctly points out, the Attorney General was timely served on October 9, 1990, as indicated on the return receipt card attached to the Summons.

(1) the Privacy Act ("PA"); (2) the Freedom of Information Act ("FOIA"); (3) the Due Process clause of the Fifth Amendment; and (4) the Takings Clause of the Fifth Amendment. However, since the plaintiff seeks, in essence, judicial review of his disability rating and of his benefits award, all four claims for relief must be dismissed for lack of subject matter jurisdiction.

All of plaintiff's claims stem from his contention that various internal procedures of the VA entitled him to a complete neurological examination by the Department of Medicine and Surgery of the VA which the BVA overlooked in denying him veterans' benefits.[3] Plaintiff's PA challenge is premised on the fact that the BVA did not include the information which a neurological examination would have revealed. Pl's Memo. of Law in Opp'n to Def's Motions to Dismiss at 30 ("Memo. in Opp'n"). The FOIA claim likewise challenges his disability rating on the ground that the VA failed to promulgate a regulation that two claimed disabilities—namely, a neurological condition of essential tremors and a disability of anxiety disorder—would be considered part of a single disability. Memo. in Opp'n at 41. Plaintiff's Procedural Due Process claim is based on the Secretary's failure to afford him a complete neurological examination which potentially could increase his disability rating.[4] Memo in Opp'n at 46-

[3] The regulations promulgated by the VA provide for medical examinations of applicants for veterans' benefits. 38 C.F.R. § 3.326. In this case, plaintiff was examined by two neurologists: Dr. Derby on February 14, 1983 and by Dr. Barrett in 1984. However, plaintiff contends that he should have undergone a complete neurological examination.

[4] In addition, plaintiff argues that the reduction of benefits for his hand tremors that he received in 1954 constitutes a

47, 51-52. Because this Court is precluded from reviewing VA determinations of benefits awards or of disability ratings, this action must be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1).

Section 511 of Title 38 provides:

> The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . . Subject to [the exceptions listed in] subsection (b), *the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court*, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a) (emphasis added).[5]

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taking. Under 38 U.S.C. § 110, a disability rating which has been in effect for twenty years can only be reduced upon a showing of fraud. Plaintiff apparently believes that the Secretary reduced his disability rating for the hand tremors when he combined plaintiff's neurological condition with his hand tremors. However, the fallacy of this argument is readily apparent since plaintiff's 30% disability rating was increased to 50% based on his anxiety disorder, which already included the disability rating associated with plaintiff's hand tremors. Accordingly, plaintiff's disability rating for his hand tremors was never reduced.

[5] None of the four exceptions enumerated in subsection (b) of section 511 is applicable to this case. Subsection (b) allows judicial review:

> (1) by the Court of Appeals for the Federal Circuit of alleged violations of FOIA, 5 U.S.C. § 552(a)(1), (agency must publish its procedures in the Federal Register) and § 553 (agency must publish proposed rules in Federal

In *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), the Court distinguished between a "review [ ] of those decisions of law or fact that arise in the *administration* by the [VA] of a *statute* providing benefits for veterans" and questions of law that "arise under the Constitution, not under the statute whose validity is [being] challenged." *Id.* at 367, 94 S.Ct. at 1165-66 (emphasis in original). The Court explained that "[a] decision of law or fact 'under' a statute is made by the [Secretary] in the interpretation or application of a particular provision of the statute to a particular set of facts." *Id.* It is such decision which is barred from judicial consideration under 38 U.S.C. § 511(a).

In *Johnson*, a conscientious objector to the military draft brought a class action challenging the denial of veterans' educational benefits to conscientious objectors, who had completed two years of

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Register) in accordance with 38 U.S.C. § 502. While plaintiff raises a FOIA claim under 5 U.S.C. § 522(a)(1), only the Federal Circuit may have jurisdiction over that challenge;

(2) of cases involving life insurance benefits under 38 U.S.C. §§ 1975, 1984;

(3) of cases involving housing and small business loans under Chapter 37 of Title 38, 38 U.S.C. §§ 3701-3751, and

(4) by the Court of Veterans Appeals under Chapter 72 of Title 38, but only in cases where a veteran filed with the BVA, on or after November 18, 1988, a notice of disagreement with the decision of the VA. Pub.L. No. 100-687, § 402, 102 Stat. 4113, 4122. In this case, plaintiff may not avail himself of that appellate procedure because he filed a notice of disagreement in 1984.

Thus, this Court does not have subject matter jurisdiction over this action under any of these four exceptions.

alternative civilian service, as violative of the First and Fifth Amendments. *Id.* at 363-64, 94 S.Ct. at 1163-64. In upholding the constitutionality of statutes relied upon by the VA, the Court held that section 211 (now section 511) did not preclude judicial review of a constitutional challenge to a decision of Congress to create a statutory class entitled to benefits that does not include conscientious objectors. *Id.* at 367, 94 S.Ct. at 1165-66. That section only bars judicial review of "the [Secretary's] interpretation or application of a particular provision of the statute to a particular set of facts." *Id.* Thus, under *Johnson*, district courts have jurisdiction over actions involving facial challenges to the constitutionality of veterans' benefits legislation—i.e., statutes or regulations—but lack jurisdiction to review the application of such legislation to the particular facts of an individual case. *See also Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1500 (2d Cir.1992) (distinguishing between facial and "as applied" challenges under Johnson). That the district court lacks subject matter jurisdiction to entertain constitutional challenges which are essentially attacks upon awards of veterans' benefits, see *Pappanikoloaou v. Administrator of Veterans Admin.*, 762 F.2d 8, 9 (2d Cir.1985) (no subject matter jurisdiction over a due process challenge), *cert. denied*, 474 U.S. 851, 106 S.Ct. 150, 88 L.Ed.2d 124 (1985). Thus, plaintiff's challenges to his disability rating premised on the PA, the FOIA, and the Due Process and Takings Clauses are attempts to circumvent 38 U.S.C. § 511(a) by seeking relief on a constitutional claim arising out of a determination concerning veterans' benefits and are dismissed for lack of subject matter jurisdiction.

The plaintiff's reliance upon *Eastern Paralyzed Veterans Assn., Inc.* v. *Veterans' Admin.*, 762

F.Supp. 539 (S.D.N.Y.1991) is misplaced and is clearly distinguishable. That was a class action on behalf of spinal cord injured patients at one VA medical center in which it was alleged that the members of the proposed class were denied rights and benefits provided other spinal cord injured patients at other VA medical centers, thereby depriving them of equal protection and due process. *Id.* at 540-41. In denying the defendants' motion to dismiss for lack of subject matter jurisdiction, the court drew the distinction identified in *Johnson v. Robison*, *supra*. The court emphasized that the plaintiff was not challenging the medical treatment afforded any specific individual, and recognized the continued authority of *Pappanikoloaou* that:

> To the extent the complaint seeks damages for the VA's denial of due process in handling his claim, we agree with those circuits that have held that one may not circumvent [§ 511(a)] by seeking damages on a constitutional claim arising out of a denial of benefits. (citations omitted).

Eastern Paralyzed, 762 F.Supp. at 542 (quoting *Pappanikoloaou*, 762 F.2d at 9). In this case, plaintiff seeks judicial review of his individual veterans' benefits determination which is clearly barred by section 511. Plaintiff also cites two lower court decisions which entertained procedural due process claims against the VA, *Beauchesne v. Nimmo*, 562 F.Supp. 250, 253-54 (D.Conn.1983); *Dumas v. Cleland*, 486 F.Supp. 149, 151-52 (D.Vt.1980); those cases, however, have been displaced by *Pappanikoloaou*. Accordingly, plaintiff's claims against the VA through defendant Secretary are dismissed for lack of subject matter jurisdiction.

The Individual Defendants

In Sugrue II, plaintiff asserts a claim for relief against S. Wohl, Robert J. Schmidt and other unnamed defendants in their individual capacities (collectively "the individual defendants"), for "render[ing] effectively unavailable the [ ] due process rights [of the Fifth Amendment] and the procedural safeguards [of the PA and FOIA]." The individual defendants are named in this action solely for their alleged acts or omissions in denying plaintiff's application for an increased disability rating. Apparently, plaintiff seeks damages against those VA employees in their individual capacity under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), for an alleged due process violation. *Davis v. Passman*, 442 U.S. 228, 248-49, 99 S.Ct. 2264, 2278-79, 60 L.Ed.2d 846 (1979).

In light of *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) and *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), this Court concludes that a *Bivens* claim cannot lie against VA employees in setting the level of veterans' benefits. In *Bush*, the Court refused to recognize a Bivens claim in the federal employment context because "special factors counsel[ed] hesitation" to create a new remedy where Congress provided for adequate remedies for constitutional violations. 462 U.S. at 388-89, 103 S.Ct. at 2416-17. Likewise, in *Schweiker*, the Court refused to recognize a *Bivens* claim against federal employees who initially denied social security benefits to the plaintiffs. 417-18, 108 S.Ct. at 2464-65. The Court held that the broad remedial structure of that statute was a "special factor" counselling against creating a new remedy. *Id.* at 423, 108 S.Ct. at 2467-68.

Here, the lack of remedies afforded by Congress and the policies underlying the lack of judicial review dictates that individual VA employees be immune from a *Bivens* suit. Allowing a disgruntled veteran to sue VA employees who apply veterans legislation in the course of their duties would severely undermine Congress' intent in precluding judicial review of challenges to veterans' benefits legislation. As the Court noted in *Johnson v. Robison*, the dual purpose of non-reviewability of VA determinations is:

> (1) to insure that veterans' benefits claims will not burden the courts and the [VA] with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of [VA] policy connected with veterans' benefits decisions will be adequately and uniformly made.

415 U.S. 361, 370, 94 S.Ct. 1160, 1167, 39 L.Ed.2d 389 (1974).

It is clear that these purposes would be frustrated if VA employees could be sued in their individual capacity for making veterans' benefits determinations. Instead of flooding already overflowing court dockets with appeals of adverse VA determinations, veterans would commence actions against individual VA employees. In addition, by entertaining lawsuits against VA employees, district courts could affect the "complex" determinations of those employees in deciding to award or deny veterans' benefits for fear of personal liability. Consequently, it is clear that congressional inaction was not inadvertent, and

plaintiff cannot recover damages against the individual defendants.[6]

Motion to Amend

Plaintiff moves to amend his complaint in Sugrue I to name the individual defendants who were named as defendants in Sugrue II. While the denial or grant of a motion to amend is within the discretion of the district court, *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 46 (2d Cir.1983) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)), "leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). In *Foman*, the Court stressed the importance of liberally granting leave to amend, unless the court finds "undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." 371 U.S. at 182, 83 S.Ct. at 230 (emphasis supplied). Cognizant of the liberal amendment policy of the Federal Rules in general, plaintiff's motion to amend must still be denied because it is clear, based on the dismissal of those identical claims in Sugrue II, that the amendment would be futile.

For the foregoing reasons, plaintiff's motion to amend the complaint in Sugrue I is denied, and the government's motion to dismiss both Sugrue I and Sugrue II as against the VA and the individual defendants is granted.

SO ORDERED.

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[6] The individual defendants would also appear to have qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV-90-1972

DANIEL SUGRUE, PLAINTIFF

-AGAINST-

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, DEFENDANT

No. CV-91-2041

DANIEL SUGRUE, PLAINTIFF

-AGAINST-

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, AND S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X AND MARY DOES 1-X, THE TRUE NAMES OF SAID DOE DEFENDANTS BEING UNKNOWN TO THE PLAINTIFF AT THIS TIME, DEFENDANTS

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

Plaintiff Daniel Sugrue commenced two actions to challenge his veterans' benefits award: CV-90-1972 ("Sugrue I") and CV-91-1972 ("Sugrue II"). The facts underlying these actions are set forth in this Court's earlier decision, *Sugrue v. Derwinski*, 808 F. Supp.

946 (E.D.N.Y. 1992), familiarity with which is assumed. In that decision, this Court dismissed both actions for lack of subject matter jurisdiction under 38 U.S.C. § 511(a). *Id.* at 949-50. A formal judgment of dismissal in accordance with Fed. R. Civ. P. 58 has entered on December 30, 1992. Plaintiff now moves this Court to amend the facts in *Sugrue* pursuant to Fed. R. Civ. P. 52(b) and to alter or amend the judgment of dismissal pursuant to Fed. R. Civ. P. 59(e) and 60(b). For the following reasons, plaintiff's motions are denied but the earlier decision is amended in part.

At bottom, plaintiff brought this action challenging his benefits award by alleging that the Department of Veterans Affairs ("VA") and its employees violated his constitutional and statutory rights in setting his veterans, disability rating at 50 percent and refusing to revise that disability rating. Since this Court determined that defendant was seeking an increased benefits award and the decisions of the Secretary of the VA are insulated from judicial review under 38 U.S.C. § 511(a), both actions were dismissed for lack of subject matter jurisdiction.

Plaintiff moves this Court under Fed. R. Civ. P. 59(e) to amend the judgment of dismissal. Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of judgment."[1] The decision to grant or deny a

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[1] The ten-day period in which a litigant may serve a Rule 59(e) motion must be strictly observed because failure to serve the motion timely precludes the court from revisiting the judgment. *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45 (2d Cir. 1982); *McCarthy v. Manson*, 554 F. Supp. 1275, 1284 n.9 (D. Conn. 1982), *aff'd on other grounds*, 714 F.2d 234 (2d Cir. 1983); Fed. R. Civ. P. 6(b). In this case, the judgment of dismissal

Rule 59(e) motion rests in the sound discretion of the district court. *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983). Moreover, relief is only available under Rule 59(e) if the movant can demonstrate manifest errors of law or fact or newly discovered evidence that was not previously available. *Wallace v. Brown*, 485 F. Supp. 77, 78 (S.D.N.Y. 1979). *See also Farkas v. Ellis*, 783 F. Supp. 830, 832-33 & n.l (E.D.N.Y. 1992) (grounds for relief under Rule 59(e) are equivalent to stated grounds for relief on motion for reargument under Local Rule 3(j), *i.e.*, "where the court has overlooked matters or controlling decisions which might have materially influenced the earlier decision.") (citations omitted), *aff'd*, 979 F.2d 845 (2d Cir. 1992); *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 123 (6th Cir. 1982) (newly discovered evidence or fundamental errors of law or fact). Based on the foregoing legal standards it is clear that plaintiff is not entitled to any relief under Rule 59(e). He does not cite any new law in his submissions for post-judgment relief,[2] nor does he cite any new facts

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was entered on Wednesday, December 30, 1992, and plaintiff's Rule 59(e) motion was filed with this Court on Thursday, January 14, 1993. In the absence of a certificate of service, this Court assumes that the Assistant United States Attorney was served on that same day. Under Fed. R. Civ. P. 6(a), where a time period in the procedural rules is less than 11 days, intermediate Saturdays, Sundays and legal holidays, including New Year's Days are excluded from the calculation. Accordingly, plaintiff's motion to amend was timely on January 14, 1993, as that was the tenth day from the entry of judgment not counting the excludable intervening days.

[2] In his Reply Memorandum of Law, plaintiff's counsel frivolously argues for the first time that the jurisdictional bar of 38 U.S.C. § 511(a) and its predecessor, § 211(a), does not apply to veterans who file notices of disagreement before Nov.

which may have been material to this Court's prior decision. Since both Sugrue I and Sugrue II were dismissed for lack of subject matter jurisdiction, the factual errors that plaintiff cites were immaterial and irrelevant to the disposition of those actions.

Similarly, Rule 60(b) does not afford plaintiff any postjudgment relief. While plaintiff does not specify the particular subdivision upon which he relies, it is clear that none of the specified grounds to relief under that rule applies. Rule 60(b) empowers a court to "relieve a party . . . from a final judgment, order or proceeding" for any one of a number of specified reasons. Those grounds include:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other

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18, 1988. Pl's [Reply] Memo. of Law at 1-3. Apparently, plaintiff's counsel is alluding to footnote 5 in *Sugrue* where this Court recognized that plaintiff could not avail himself of the procedures for judicial review in 38 U.S.C. §§ 502, 511(b)(4) because he filed a notice of disagreement in 1984. But plaintiff's counsel overlooks the teachings of *Johnson v. Robison*, 415 U.S. 361 (1974) and *Pappanikoloaou v. Administrator of Veterans Admin.*, 762 F.2d 8 (2d Cir. 1985), *cert. denied*, 474 U.S. 851 (1985), which are cited in this Court's earlier decision and need not be repeated here.

> reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

The granting of relief under Rule 60(b) is committed "to the sound discretion of the district court, and "[m]otions under Rule 60(b) . . . are generally granted only upon a showing of exceptional circumstances." *Mendell in Behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990), *aff'd*, ___U.S. ___, 111 S. Ct. 2173 (1991). Because plaintiff has not demonstrated any "exceptional circumstances" for this Court to revisit its initial determination, the motion is denied.

Likewise, this Court declines to vacate the judgment of dismissal under the broad "catch-all" provision of Rule 60(b)(6), which authorizes the court to alter a judgment for any other reason justifying relief and which "is applicable only where the more specific provisions do not apply." *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 898 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983). A motion under that subdivision is "generally granted only upon a showing of exceptional circumstances," *Mendell*, 909 F.2d at 731, or where the judgment or order poses an "extreme or undue hardship" to a party. *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977). Thus, since plaintiff has not made either requisite showing, Rule 60(b)(6) is not a proper basis for relief.

Plaintiff also moves this Court under Fed. R. Civ. P. 52(b) to amend *Sugrue*, to reflect (1) that Dr. Bennett Derby, the board certified neurologist who examined plaintiff in 1983, was a VA employee[3] and

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[3] *But see* Pl's Memo. of Law in Opp'n to Defs' Mots. to dismiss the Complaint at 6, dated Oct. 15, 1992 ("The

(2) that Dr. Barrett, another neurologist, examined plaintiff in 1987.[4] Rule 52(b) provides that a party may move the court within ten days of entry of judgment to amend its factual findings and to amend the judgment accordingly. However, a motion under Rule 52(b) is not available to amend the facts cited in a written opinion dismissing an action under Fed. R. Civ. P. 12; it is limited to a motion to amend the district court's findings of fact after a bench trial. *Farkas v. Ellis*, 783 F. Supp. 830, 832 (S.D.N.Y.), *aff'd*, 979 F.2d 845 (2d Cir. 1992).

As a final note, this Court is confused as to why plaintiff's counsel has seen fit to repeatedly adopt inconsistent positions in this action. In moving for post-judgment relief and at oral argument on the instant motion on March 26, 1993, counsel stated that plaintiff never sought judicial review of his veterans, benefits award. Decl. of Kevin P. Quill, dated January 13, 1993, at ¶ 5 ("Nowhere in plaintiff's complaints, brief, or other documents submitted to the Court, can it be found that plaintiff argued that he was entitled to a higher rating.") Yet, in both Sugrue I and

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examining physician was Bennett M. Derby, M.D., a board certified neurologist. He was at th[at] time . . . on retainer with the Veterans Administration and *was not an employee.*) (emphasis supplied).

[4] Neither the complaint in Sugrue I nor the complaint in Sugrue II specify the year in which Dr. Barrett examined plaintiff, except that it occurred before the Board of Veterans Appeals "BVA") affirmed plaintiff's assigned disability rating on June 10, 1988. *See* Sugrue I Complaint ¶ 67; Sugrue I Amended Complaint at 80; and Sugrue II Complaint at ¶ 80. Furthermore, plaintiff himself suggests that the BVA affirmed Robert Schmidt's decision upon reviewing both Dr. Derby's and Dr. Barrett's diagnoses. *See* Pl's Memo. of Law, dated Oct. 15, 1992 at 14.

Sugrue II plaintiff expressly asks for such relief. *See* Sugrue I Amended Complaint and Sugrue II Complaint at Prayer for Relief, (f) (asking this Court to "direct[] defendant to place plaintiff in the position he would have occupied but for defendant's unlawful acts and conduct and making him whole for all entitlements and benefits he would have received but for defendant's unlawful acts and conduct.").

Likewise, counsel has stated that this case involved a failure to treat claim. Tr. of Dec. 11, 1992 Oral Arg. at 7-8, 10 (*cited in* Defs' Memo. of Law in Opp'n to Pl's Mot. to Amend at 13). However, that allegation is nowhere to be found in any complaint filed in Sugrue I and Sugrue II, and contradicts plaintiff's counsels statement that "[p]laintiff makes no claims concerning medical treatment." Pl's Memo. of Law, dated Oct. 15, 1992 at 24. *See also* Pl's [Reply] Memo. of Law, dated March 19, 1993 at 2 ("It is conceded that the present [case] is not a type of level of [medical] care case.").

For the foregoing reasons, plaintiff's motion is denied and this Court's prior decision is amended, for clarification purposes only, as follows:

(1) the first two lines on 808 F. Supp at 948 should read:

> physician, Dr. Bennett Derby, who was a VA employee, determined that plaintiff

(2) the second and third sentences of the first full paragraph on page 948 should read:

> Plaintiff was then sent to a psychiatrist, Dr. Abeles. Based on this examination, in a letter . . . ; and

(3) the second sentence of footnote 3 on page 948 should read:

> In this case, plaintiff was examined by two neurologists: Dr. Derby on February 14, 1983 and by Dr. Barrett in 1987.

SO ORDERED.

Dated: Brooklyn, New York
March 26, 1993

/s/ I. Leo Glasser
I. LEO GLASSER, U.S.D.J.